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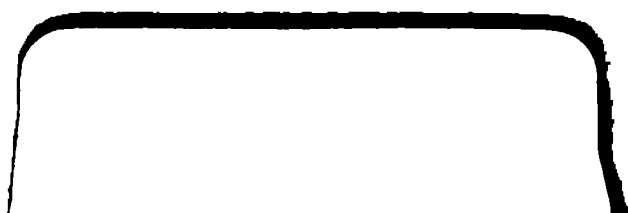
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NEW JERSEY EQUITY REPORTS.

VOLUME XXV.

C. E. GREEN, X.

REPORTS OF CASES

ARGUED AND DETERMINED IN

f7

THE COURT OF CHANCERY,

2088 THE PREROGATIVE COURT,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

CHARLES EWING GREEN, Reporter.

VOL. X.

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DURING THE PERIOD OF THESE REPORTS,

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VICE-CHANCELLOR,

Hon. AMZI DODD.

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“ SAMUEL LILLY.

This volume contains the opinions delivered in the Court of Chancery, from May Term, 1874, to and including part of February Term, 1875, and in the Prerogative Court, during the same period ; and also the opinions in equity cases in the Court of Appeals, of June and November Terms, 1874.

NEW JERSEY REPORTS.

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CASES

REPORTED IN THIS VOLUME.

A.		Close v. Close	434, 526
		Coffin v. Loper.....	443
Ackerman v. Blauvelt.....	570	Coggill v. Millburn Land Co.....	87
Albert v. Burbank.....	404	Colie, Hill v.....	469
Allen's Executors v. Roll.....	163	Colt, Fowler v.....	202
		Cook, Eaton v.....	55
		Cool's Ex'rs v. Higgins.....	117
B.		Corey, Johnston v.....	311
		Craige v. Morris.....	467
Ballard, Gillette v.....	491	Crane, Homeopathic Ins. Co. v....	418
Barlement, Fraas v.....	84	Creamer and Emery, Melick and	
Barrell v. Barrell.....	173	Dayton v.....	429
Barrett v. Doughty.....	379	Cronkright v. Haulenbeck.....	513
Beatty, Frazier's Adm'rs v.....	343	Curry v. Glass.....	108
Bedle v. Wardell.....	349	Cutler, Sharp's Adm'rs v.....	425
Bell v. Gilmore.....	104	Cutting v. Dana.....	265
Bigelow, Cassidy v.....	112	D.	
Blauvelt, Ackerman v.....	570	Dana, Cutting v.....	265
Bogert v. City of Elizabeth.....	426	Dayton v. Dusenbury.....	110
Borden, Vanmeter v.....	414	DeLuze v. Bradbury.....	70
Bowlby v. Bowlby.....	406, 570	Dewey's Ex'rs v. Ruggles.....	35
Bradbury, DeLuze v.....	70	Diebold, Huber v.....	170
Brittan, Citizens Ins. Co. v.....	331	Dillett v. Kemble.....	66
Brokaw, Rogers v.....	496	Dinsmore v. Westcott.....	302, 470
Bullock's Ex'rs v. Woodward.....	279	Doremus, Leggett v.....	122
Burbank, Albert v.....	404	Dorsheimer, Rorback v.....	516
Butterfield v. Third Ave. Savings		Doughty, Barrett v.....	379
Bank	533	Douglas v. Merceles.....	144
C.		Drake, Rahway Savings Institu-	
		tion v	220
Calame v. Calame.....	548	Driggs v. Garretson.....	178
Campbell, Silver v.....	465	Dusenbury, Dayton v.....	110
Warnock v.....	485	Dusenbury v. Mayor, &c., of New-	
Carpenter v. Carpenter.....	194	ark.....	295
Cassidy v. Bigelow.....	112	E.	
Chambersburg, Manko v.....	168		
Chapman v. Chapman.....	394		
Child, Parker v.....	41		
Citizens Ins. Co. v. Brittan..	331	Easton and Amboy R. R. Co. v.	
City of Elizabeth, Bogert v.....	426	Inhabitants of Greenwich.....	565
City of Elizabeth, Lewis v.....	298	Easton and Amboy R. R. Co.,	
Clarke v. McGeihan.....	423	Mettler v.....	214
Clement's appeal, In matter of....	508	Eaton v. Cook.....	55
Clinton Station Man'f'g Co. v.		Elmer v. Loper.....	475
Hummell.....	45	Ennis, Jacques v	402

F.		Jaqui, Johnson v.....410
Field, Thropp v.....166		Jarvis v. Henwood.....460
Fisher, McDowell's Ex'rs v..... 93		Johnston v. Corey.....311
Fowler v. Colt.....202		—— v. Hyde.....454
Fox v. Palmer.....416		Johnson v. Jaqui.....410
Fraas v. Barlement..... 84		
Frazier's Adm'rs v. Beatty.....343		K.
Fulton v. Golden.....353		Kimble, Dillett v..... 66
		Kline's Adm'r, Swackhamer v....503
G.		Kline v. McGuckin433
Gardner's Adm'r v. Schooley.....150		Koegel, Hecht v.....135
Garretson, Driggs v178		Kuhl, Hewitt v..... 24
Garthwaite's Ex'rs v. Lewis.....351		Kuhl & Hewitt, Smith & Martin v. 38.
Gilchrist, McFarland v.....487		
Gillette v. Ballard.....491		L.
Gilmore, Bell v.....104		LaBar, Taylor v.....222
Glass, Curry v.....108		Lanning v. Heath425
Golden, Fulton v.....353		Leaning v. Leaning.....241
Graydon's Ex'rs v. Graydon.....561		Leggett v. Doremus.....122
Grode v. Van Valen..... 95		Lewis, Garthwaite's Executor v...351
Gulick's Ex'rs v. Gulick.....324		—— v. City of Elizabeth.....298
		Lister, Meigs v.....489
H.		Locander, Lounsbery v.....554
Haggerty v. McCanna..... 48		Loper, Coffin v.....443
Hague, Ward's Executors v.....397		—— Elmer v.475
Haines v. Pohlman.....179		Lore v. Stiles.....381
Hand v. Jacobus.....154		Louderbough v. Weart.....399
Haulenbeck, Cronkright v.....513		Lounsbery v. Locander.....554
Heath, Lanning v.....425		Lum, Pierson v.....390.
Hecht v. Koegel.....135		
Henwood, Jarvis v.....460		M.
Hewitt, In matter of.....210		Macintosh v. Thurston.....242
Hewitt and Ward v. Montclair		Manko v. Chambersburg.....168.
Railway Co.....100		Marlatt, Warwick v.....188
Hewitt v. Kuhl..... 24		Mayor, &c., of Bayonne, Morris v.345
—— v. Montclair Railway Co.392		Mayor, &c., of Newark, Dusen-
Higgins, Cool's Executors v.....117		bury v..... 295
Hill v. Colie.....469		McCanna, Haggerty v..... 48
Hitchner, Pierson v.....129		McDowell's Executors v. Fisher ...93
Homeopathic Ins. Co. v. Crane...418		McFarland v. Gilchrist.487
Horton, Tompkins v.....284		McGeihan, Clarke v.....423
Huber v. Diebold170		McGuckin, Kline v.....433
Hudson Tunnel R. R. Co., Morris		McKillopp v. Taylor.....139
and E. R. R. Co. v.....384		Meigs v. Lister.....489
Hummell, Clinton Station Manf'g		Melick v. Creamer.....429
Co. v..... 45		——, Vorhees' Executrix v.....523.
Hyde, Johnston v.....454		Mercedes, Douglas v.....144
		Metler v. Easton & Amboy R. R.
I		Co.....214
Inhabitants of Greenwich, Easton		Mickle, In matter of..... 53
and Amboy R. R. Co. v.....565		Middleton v. N. J. West Line R.
		R. Co.....306
J.		Millburn Land Co., Coggill v..... 87
Jacobus, Hand v.....154		Miller v. Wright.....340
Jacques v. Ennis.....402		Miller's Adm'r v Miller.....354
		Montclair Railway Co., Hewitt v..392
		Montclair R. Co., Hewitt & Ward v100.

TABLE OF CASES.

ix

Moore, Parker's Executors v.....	228	Shreve, Mott v.....	438
Morris, Craige v.....	467	Silver v. Campbell.....	465
Morris and E. R. R. Co. v. Hud-		Sire v. Wightman.....	102
son Tunnel R. R. Co.....	384	Smith, Reilly v.....	158
Morris v. Mayor, &c., of Bayonne.	345	— and Martin v. Kuhl and	
— v. Woodward.....	32	Hewitt.....	38
Morrison, Phelps, v.....	538	Southard, Mutual Life Ins. Co. v..	337
Mott v. Shreve.....	438	Stiger, VanDeventer v.....	224
Mutual Life Ins. Co. v. Southard.	337	Stiles, Lore v.....	381
Myer v. Myer.....	28	Stone v. Stone.....	445
		Swackhamer v. Kline's Adm'r....	503
		Swartwout, In matter of will of..	369

N.

New Jersey Stone Co., Vreeland v.	140
New Jersey South. R. R. Co., Up-	
ton and Williamson v	13, 372
New Jersey West Line R. R. Co.,	
Middleton v.....	306
Nichols v. Nichols.....	60

P.

Palmer, Fox v.....	416
Parker v. Child.....	41
Parker's Executors v. Moore.....	228
Paterson Silk Manuf'g Co., Wash-	
ington Life Ins. Co. v	160
Persons v. Persons.....	250
Phelps v. Morri-on.....	538
Pickert v. Ridgefield Park R. R.	
Co.....	316
Pierson v. Hitchner.....	129
— v. Lum.....	390
Pinner, Union National Bank of	
Rahway v.....	495
Pohlman, Haines v.....	179
Post, Raymond v.....	447
Prince v. Prince.....	310

R.

Rahway Savings Institution v.	
Drake.....	220
Raleigh v. Rogers.....	506
Raymond v. Post.....	447
Reilly v. Smith	158
Ridgefield Park R. Co., Pickert v.	316
Rogers, Raleigh v.....	506
— v. Brokaw.....	496
Roll, Allen's Executor v.....	163
Rorback v. Dorsheimer.....	516
Ruggles, Dewey's Executors v....	35

S.

Schooley, Gardner's Adm'r v.....	150
Sharp's Adm'rs v. Cutler.....	425

T.

Taylor, McKillop v.....	139
— v. LaBar.....	222
Third Avenue Savings Bank, But-	
terfield v.....	533
Throop v. Field.....	166
Thurston, Macintosh v.....	242
Titus and Scudder v Todd's Adm'r.	458
Todd's Adm'r, Titus and Scudder	
v.....	458
Tompkins v. Horton.....	284

U.

Union National Bank of Rahway	
v. Pinner.....	495
Upton and Williamson v. N. J.	
Southern R. R. Co.....	372

V.

VanDeventer v. Stiger.....	224
Vanmeter v. Borden.....	414
Van Valen, Grode v.....	95
Voorhees' Executrix v. Melick...	523
Vreeland v. New Jersey Stone Co.	140

W.

Ward's Executors v. Hague.....	397
Wardell, Bedle v.....	349
Warnock v. Campbell.....	485
Warwick v. Marlatt.....	188
Washington Life Ins. Co. v. Pat-	
erson Silk Manuf'g Co.....	160
Weart, Louderbough v.....	399
Westcott, Dinsmore v.....	302, 470
White, In matter of.....	501
Wightman, Sire v.....	102
Williamson and Upton v. New	
Jersey Southern R. R. Co.....	13
Woodward, Bullock's Executors v.	279
—, Morris v.....	32
Wright, Miller v.....	340

CASES

CITED IN THIS VOLUME.

A.

Abrahams, Fuller v.....	34	Baden v. Pembroke, Countess of.....	365
———, Hogencamp v.....	143	Bagwell, Stevens v.....	370
Ackerman v. Shelp.....	468	——— v. Dry.....	353
Adam, Page v.....	99	Baker, Teasey v.....	143
Adams, Deering v.....	505	Ball v. Coggs.....	271
——— v. Ross.....	558	——— v. Harri.....	37, 98
Adamson v. Armitage.....	328	Balmanno v. Lumley.....	559
Adderley v. Dixon.....	270-1	Bank of the Metropolis v.	
Albertson, Mech. Mutual Loan		Sprague	173, 246-8
Association v.....	294	Bank of New York, Kip v.....	164
Albrecht, Duncuft v.....	271	Banks v. Wilkes.....	165
Alexander v. Mills.....	126	Baptist Church v. Robbarts.....	503
——— v. Wellington, Duke		Barrow v. Bispham.....	557
of.....	372	Bartles, Opdyke v.....	134
Allen, Bryant v.....	505	Bartlett, Boston and Maine R. R.	
———, Bush v.....	238	Co. v.....	274
———, South v.....	238	Basset v. Noworthy.....	541
Alston v. Davis.....	329	Bateman v. Bateman.....	37
Ames, New Jersey Franklinite		Bathurst, Simpson v.....	126
Co. v.....	19	Beach v. Rar. and Del. Bay R.	
Amott v. Holden.....	104	R. Co.....	147
Anderson, Roberts v.....	544	Bedwell, Townley v.....	365
Andrews v. Sparhawk.....	37	Belford v. Crane.....	47, 197, 259
Annin v. Annin.....	197, 259	Bell v. Wright.....	270
Archbishop of York, Metcalfe v..	20	Bellinger v. Shafer.....	51
Armitage, Adamson v.....	328	Bement v. Trenton Locomotive	
Armour, McKelway v.....	51	Co.....	451
Arrowsmith, Schanck v.....	97	Benedict v. Gilman.....	43
Arundell, Lady, v. Phipps.....	552	Bennet, Lawes v.....	365
Ashburner, Fletcher v.....	365	Bernard, Doe v.....	468
Ashley's Adm'r, Shields v.....	505	Bevill, Thornbury v.....	274
Associates of the Jersey Co. v		Bignall v. Atkins.....	125
Davison.....	247-8, 451	Billing v. Billing.....	328
Ashton, Aylett v.....	559	Bingham, Crane v.....	498
Atkins, Bignall v.....	23	Bispham, Barrow v.....	557
Attorney-General v. Day.....	366	Blackburn, Hobson v.....	383
——— v. Purmort.....	273	Blair v. Ward.....	398
Austen v. Dadwell's Executors...	116	Blauvelt v. Smith.....	414
Austin, Trecothick v.....	164	Boisauvin, Houghwout v.....	274
Averill v. Taylor.....	116	Bolder, Wilding v.....	241
Avery v. Pixley.....	502	Bolitho, Lewis v.....	505
Aylett v. Ashton.....	559	Bond v. Newark.....	296, 301

B.

Babbitt v. Condon.....	247-8	Boston and Maine R. R. Co. v.	
Bacot v. Wetmore.....	125	Bartlett.....	274
		Bowen v. Vickers.....	557
		Bowman v. Rainetaux.....	165
		Bowne v. Joy.....	354

Bowyer, Curre v.....	365	Cheever v. Wilson.....	63
Boyd, Brisban v.....	274	Chickering v. Lovejoy.....	248
Brace v. Marlborough, Duchess of.....	541	Christy v. Courtenay.....	260
Bragaw, Way v.....	353	Clark, Furman v.....	270
Bramhall, Hoy v.....	399	——, Kirk v.....	480
Brearley v. Cox.....	499	—— v. Clark.....	238
Brewster v. Newark.....	144	—— v. Flint.....	271-3
Brick v. Getsinger.....	92	—— v. Smith.....	482
Brighton, &c., Railway Co., Langford v.....	323	Clarke, Dunn v.....	375
Brisban v. Boyd.....	274	—— v. Mathewson.....	375
Broder, Chapin v.....	106	—— v. White.....	468
Brolasky v. Miller.....	192	Cleator, Robinson v.....	352
Brown, Champion v.....	365	Clos v. Boppe.....	43
——, v. Fuller.....	143	Clough v. Wynne.....	236
——, v. Van Dyke.....	179	Clowes, Hawley v.....	444
Browning v. Cam. and Woodb. R. Co.....	218	Clutch v. Clutch.....	527
Brunell's Executor, Dias v.....	164	Cobb v. Thornton.....	106
Brutus, The.....	370	Coddington v. Dry Dock Co.....	247
Bryant v. Allen.....	505	Coe, Pennock v.....	21
Bubb's Case.....	365	Coffin v. Ray.....	543
Bulkeley, Ren v.....	126	Colburn, Ensign v.....	366
Bunn, Robins v.....	288	Cole, Laning v.....	274
Burd, Semple v.....	543	Coleman, Carson v.....	323
Burgis v. Burgis.....	510	Coley v. Coley.....	154
Burk's Heirs v. Osborn.....	468	Collard v. Smith.....	470
Bush, Davies v.....	126	Collingwood v. Row.....	365
—— v. Allen.....	238	Colt, Fowler v.....	205
Butterworth, Walmesly v.....	126	Colton, Terhune v.....	97, 535
Buxton v. Lister.....	270	Comyns, Morrough v.....	370
		Condon, Babbitt v.....	247-8
		Conn. River R. R. Co., Inhabitant, &c., v.....	568
		Conover, Schenck v.....	414
		—— v. Tindell.....	557
		—— v. Van Mater.....	163
		Cook, Ellsworth v.....	403
		—— v. Cook.....	527
		Cooke, Milligan v.....	559
		—— v. Wiggins.....	553
		Cool's Executors v. Higgins.....	165
		Cooper, Stevens v.....	116
		—— v. Martin.....	43, 52
		Cornish v. Cornish.....	409, 510
		Corry, Smith v.....	510
		Courtenay, Christy v.....	260
		Covenhoven v. Shaler.....	238
		Cowen, Davidson v.....	543
		Cox, Brearley v.....	499
		—— v. Wheeler.....	441
		Craig, Manning v.....	328
		Cramer v. Reford.....	47, 197, 259
		Crane, Belford v.....	47, 197, 259
		—— v. Bingham.....	498
		Crehore, Gibson v.....	43
		Crisp, ex parte.....	116
		Cropsey, Shark v.....	52
		Crowell, Doughaday v.....	176
		Cunynghame v. Thurlow.....	128
		Curre v. Bowyer.....	365
		Cutler v. Tuttle.....	525

C.

Caldwell, Utica Ins. Co. v.....	163
Calf, Vredenburg v.....	510
Camden and Amboy R. R. Co., Higbee v.....	323
Camden and Atlantic R. R. Co., Starr v.....	388
Camden and Woodb. R. R. Co., Browning v.....	218
Campbell v. Thatcher.....	510
Canham, Gold v.....	316
Canton Co., Wells v.....	224
Carolus v. Lynch.....	510
Carow v. Mowatt.....	510, 520
Carpenter v. Muchmore.....	305
Carron v. Martin.....	475
Carson v. Coleman.....	323
Carter, Mitchinson v.....	128
Central R. R. Co. v. Hetfield.....	388
Chambers, Jacques v.....	383
Champion v. Brown.....	365
Chandler, Thompson v.....	43
Chapin v. Broder.....	106
Chaplin v. Simmons' Heirs.....	468
Charing Cross Railway Com'y, Wood v.....	323
Cheesebrough v. Millard.....	116, 399

D.		Egremont, Earl of, Earl of North-	
		umberland v	58
Dadwell's Executors, Austen v	116	Eidell v. Hamneraley	126
Dana v Fiedler	147	Eliason v. Henshaw	274
Daniels v. Davison	365	Elliott v. Merryman	37, 99
Dartmouth, Earl of, Howe v	238	Ellsworth v. Cook	403
Davidson v. Cowen	543	Emans' Adm'rs, Hinchman v	43
— v. Thompson	176	Emery v. Neighbour	552
Davies, Skidmore v	510	Emmons v. Hinderer	366
— v. Bush	126	English, Ridgeway v	154
— v. Davies	503	Englund v. Lewis	106
Davis, Alston v	329	Ensign v. Colburn	360
Davison, Associates of the Jersey		Ensworth v. Lambert	23
Co. v.	247-8, 451	Etter, Spence v	292
Davison, Daniels v	365	Evans v. Evans	527
Day, Attorney-General v	366	Everly v. Rice	143
De Agreda v. Mantel	106		
Deere v. Guest	323	F.	
Deering v. Adams	506	Fagin, Morris C. and B. Co. v	323
— v. Torrington	164	Farn, Warburton v	126
Den, Tindall v	557	Farrar v. Winterton, Earl of	366
Derrickson, Edwards v	288	Farrow v Vansittart	457
De Valengin's Adm'rs v. Duffy	165	Faulkner v Whitaker	163
De Veney v. Gallagher	457	Fiedler, Dana v	147
Devoy v. Devoy	260	Field, Hunt v	109
Dew Dowell v	274	— v. Mayor of New York	21
Dias v. Brunell's Executor	164	Fish v Howland	121
Dixon, Adderley v	270-1	Fitzer v Fitzer	553
—, Vito Viti v	292	Flax Co., Grosvenor v	163
Dodd v. Lydall	27	Fletcher v. Ashburner	365
— v. Seymour	558	Flint, Clark v	271-3
Doe v Bernard	468	Follet v. Tyrer	403
Doloret v Rothschild	270	Forbes v. Moffatt	43
Donaldson, New York Fire Ins.		Forster v. Hale	59
Co. v	163	Fowler v. Colt	205
Dorr v. Wainwright	240	Frampton v. Frampton	553
Doughaday v. Crowell	178	Freeman, More v	553
Dowell v. Dew	274	Frey, Lantz v	52
Downey, Van Not v	111	Frost, Saunders v	115
Drenkle's Estate	365	Fryer, Jenkins v	97
Dry, Bagwell v	353	Fuller, Brown v	143
Dry Dock Co., Coddington v	247	— v. Abrahams	34
Duckmanton v. Duckmanton	383	Funtis, Megary v	183
Dudin, Whittell v	329	Furman v. Clark	270
Duffin v Wolf	109		
Duffy, De Valengin's Adm'rs v	165	G.	
Duncan v. Lyon	27	Gallagher, De Veney v	457
— v. Smith	43	Gardner v Gardner	37, 98
Duncuft v. Albrecht	271	Garlick v. Strong	380
Dunn v. Clarke	375	Gaugain, Whitworth v	541
Dunne, Latouche v	173	Getsinger, Brick v	92
Duncomb v. Duncomb	403	Gibson v. Crehore	43
Durkin, Walsh v	354	Giddings v Seward	239
		Gilman, Benedict v	43
		Gold v. Canham	316
		Gompertz v. Gompertz	352
E.			
Eda, State of Iowa v	292		
Edwards v. Derrickson	288		

[illegible]

CASES CITED.

xv

Johnson, Van Orden v.....398
 Jones' Executors v. Stites...236, 238
 ——— Executors v. Winwood.....126
 ——— Executors, Wigan v.....127
 Joslin v. Hammond.....329
 Josselyn, Sparrow v.....233
 Joy, Bowne v.....354

K.

Kanouse v. Martin.....376
 Kavanagh, Kyle v.....558
 Kelly v. Kelly.....528
 Kennett, Johnson v.....97
 Kilpin v. Kilpin.....59
 King v. Ruckman.....365
 Kingston's Case, Duchess of.....65
 Kinnier v. Kinnier.....63
 Kip v. Bank of New York.....164
 Kirk v. Clark.....480
 Kirrigan v. Kirrigan.....63, 65
 Knight, Hobbs v.....503
 Kyle v. Kavanagh.....558

L.

Lambell v. Lambell.....503
 Lambert, Ensworth v.....23
 Langton v. Horton.....21
 Langford v. Brighton, &c.. Rail-
 way Co.....323
 Laning v. Cole.....274
 Lantz v. Frey.....52
 Large v. Van Doren.....165
 Latonche v. Dunsany.....173
 Laverack, The State v.....389
 Law, People v.....388
 Lawes v. Bennet.....365
 Lawrence, matter of.....510
 Leddel's Executor v. Starr.....166
 Leigh v. Savidge.....206
 Levy, Mechanics Bank v.....143
 Lewis, Englund v.....106
 ——— v. Bolitho.....505
 ——— v. Lewis.....352
 ——— v. Maddocks.....21
 Liebstein v. Newark.....296, 301, 428
 Lindsay, Harris v.....460
 Lister, Buxton v.....270
 Long v. Rankin.....126
 Longest, Gordon v.....376
 Loomis, Smith v.....143
 Lovejoy, Chickering v.....248
 Lozeau v. Shields.....430
 Lucas v. Lucas.....552
 Lumley, Balmano v.....559
 Lydall, Dodd v.....27
 Lyde v. Minn.....20

Lyon, Duncan v.....27
 Lynch, Carolus v.....510

M.

Mackerley, Massaker v.....425
 Maddocks, Lewis v.....21
 Malin v. Malin.....480
 Malleson's Executors, Hopper v..475
 Manch. and Birm. Railway Co.,
 Greenhalgh v.....323
 Manhattan Co., Quinby v.....499
 Manning, Craig v.....328
 Mantel, De Agreda v.....106
 Marlborough, Duchess of, Brace v.541
 Marsh, Tyrrell v.....126
 ——— v. Marsh.....395
 Martin, Carron v.....475
 ———, Cooper v.....43, 52
 ———, Kanouse v.....376
 ——— v. Ranlett.....34
 ——— v. Somerville Co.....309
 Massaker v. Mackerley.....425
 Mathewson, Clarke v.....375
 Mayer v. Townsend.....329
 Mayor of New York, Field v.....21
 McCraer, Worthington v.....52
 McKelway v. Armour.....51
 McKennan v. Phillips.....553
 McLaughlin, Southmayd.....457
 ——— v. McLaughlin.....469
 McNeely, Stillwell v.....165, 380
 Mechanics Bank v. Levy.....143
 Mech. Mut. Loan Association v.
 Albertson.....294
 Megary v. Funtis.....183
 Merryman, Elliott v.....37, 99
 Mervin v. Smith.....143
 Metcalfe v. Archbishop of York. 20
 Michenor, Williams v.....109
 Midmer, Wetmore v.....125
 Milford v. Milford.....527
 Millard, Cheesebrough v.. ...116, 399
 Miller, Brolasky v.....192
 ——— v. Gregory.....166
 Milligan v. Cooke.....559
 Mills, Alexander v.....126
 ——— v. Rogers.....35
 Minn, Lyde v.....20
 Mitchinson v. Carter.....128
 Mocatta v. Murgatroyd.....43
 Moffatt, Forbes v.....43
 Mollan v. Torrance.....375
 More v. Freeman.....553
 Morgan, Rockwell v.....134
 ——— v. Morgan.....238
 Morgan's Heirs v. Morgan.....374
 Morgell, Roche v.....179
 Moroney's Appeal.....224, 248

Morris, Taylor v.....	422	Page v. Page.....	353
——, Wooden v.....	391	——, Wurts' Executors v.....	328
Morrrough v. Comyns.....	370	Pallas, Green v.....	144
Morris C. and B. Co. v. Fagin.....	323	Pardee v. Van Anken.....	116
—— v. Jersey City.....	144, 297, 302, 428	Parker, Sweet v.....	434
Morris C. and B. Co. Willink v.....	19, 21	——, Wake v.....	384
Moses v. Murgatroyd.....	164	Parker's Appeal.....	234
Mowatt, Carow v.....	510, 520	Parsons, Sargent v.....	176
Muchmore, Carpenter v.....	304	Paterson Horse R. R. Co., Hinch-	
Muir v. Newark Savings Instit'n.....	163	man v.....	384
Mulford v. Hiers.....	365	Paul, Young v.....	159, 557-
—— v. Peterson.....	43	Payne v. Stone.....	5
Murgatroyd, Mocatta v.....	43	Peer v. Peer.....	26
——, Moses v.....	164	Pembroke, Countess of, Baden v.....	36
Murphy, Inge v.....	468	Pennock v. Coe.....	2
		—— v. Hoover.....	22
		Pentz v. Simonson.....	39
		People v. Law.....	38
		Pergeaux, Quidort's Adm'r v.....	4
		Peterson, Mulford v.....	4
		Pew v. Hastings.....	51
		Phillips, McKennan v.....	55
		Phipps, Lady Arundell v.....	55
		Picquet, Swan v.....	50
		Piers v. Tuite.....	12
		Pinner v. Sharp.....	17
		Pixley, Avery v.....	50
		Potts v. N. J. Arms and Ordnance	
		Co.....	30
		Potts v. Whitehead.....	27
		Potter v. Tuttle.....	55
		Powell, Price v.....	50
		Prall v. Smith.....	11
		Prickett v. Prickett's Adm'rs.....	15
		Price, Grove v.....	5
		—— v. Powell.....	50
		Proctor v. Wanmaker.....	51
		Purmort, Attorney-General v.....	27
		Putnam v. Ritchie.....	5
		Pym, Gordon v.....	2

N.

Neighbour, Emery v.....	552		
Neville, Taylor v.....	271		
New Barbadoes Toll Bridge Co.			
v. Vreeland.....	557		
New Jersey Arms and Ordnance			
Co., Potts v.....	309		
New Jersey Franklinite Co. v.			
Ames.....	19		
New Jersey Oil Co., Griffin v.....	163		
New York Fire Ins. Co. v. Don-			
aldson.....	163		
New York, Varick v.....	170		
Newark, Bond v.....	296, 301		
——, Brewster v.....	144		
——, Liebshtein v.....	296, 301, 428		
Newark Savings Institution,			
Muir v.....	163		
Newell v. Newton.....	354		
Newton, Newell v.....	354		
Nixon v. Hyserott.....	558		
Noble, Jackson v.....	329		
Northcote, Skrymsher v.....	353		
Northumberland, Earl of, v. Earl			
of Egremont.....	58		
Nosworthy, Basset v.....	541		

O.

O'Brien v. Hulfish.....	166		
Obert v. Obert.....	444		
Ogilvie v. Foljambe.....	557		
—— v. Hamilton.....	510		
Onderdonk v. Gray.....	166		
Opdyke v. Bartles.....	134		
Osborn, Burks' Heirs v.....	468		

P.

Page v. Adam.....	99		
-------------------	----	--	--

Q.

Quidort's Adm'r v. Pergeaux.....	4
Quinby v. Manhattan Co.....	49

R.

Rader v. Road District.....	30
Rainetaux, Bowman v.....	10
Rankin, Long v.....	14
Ranlett, Martin v.....	4
Rar. and Del. Bay R. R. Co.,	
Beach v.....	14
Rawson v. Samuel.....	4
Ray, Coffin v.....	5
Reeves, Scull v.....	1

Reford, Cramer v.....	47, 197, 259	Shore, Humble v.....	353
Remer v. Shaw.....	470	Shuler, Covenhoven v.....	238
Ren v. Bulkeley.....	126	Shumway v. Stillman.....	63
Reynolds, Hatfield v.....	183	Shuttleworth, Wartnaby v.....	27
Rice, Everly v.....	143	Sidmouth v. Sidmouth.....	260
Richardson v. Richardson.....	505	Simmons' Heirs, Chaplin v.....	468
Ridgway v. English.....	154	Simonson, Pentz v.....	391
Riesz's Appeal ...	159	Simpson v. Bathurst.....	126
Rines, Smith v.....	379	Singer v. Singer.....	65
Ripley v. Waterworth.....	365	Skidmore v. Davies.....	510
Risdale, Star Brick Co. v.....	537	Skillman v. Skillman....	47, 197, 259
Ritchie, Putnam v.....	51	Skrymsher v. Northcote.....	353
Road District, Rader v.....	309	Smith, Blauvelt v.....	414
Robbarts, Baptist Church v.....	503	——, Collard v.....	470
Robert v. Hodges.....	109	——, Duncan v.....	43
Roberts v. Anderson.....	544	——, Griggs v.....	248
Robins v. Bunn.....	288	——, Mervin v.....	143
Robinson, Howard v.....	291-2	——, Prall v.....	111
—— v. Cleator.....	352	—— v. Clark.....	482
Roche v. Morgell.....	179	—— v. Cory.....	510
Rockwell v. Morgan.....	134	—— v. Green.....	116
Rogers, Mills v.....	35	—— v. Greenlee.....	35
—— v. Rogers.....	304	—— v. Hubbard.....	365
Ross, Adams v.....	558	—— v. Loomis.....	143
Rothschild, Doloret v.....	270	—— v. Rines.....	379
Row, Collingwood v.....	365	Smock, Johnson v.....	557
Rowe, Hassard v.....	51	—— v. Smock.....	503
Rowe's Executors v. White.....	236	Sneyd v. Sneyd.....	134
Ruckman, King v.....	365	Somerville Co., Martin v.....	309
Rutland, Duchess of, Wakeman v.	68	South v. Allen.....	238
S.		Southmayd v. McLaughlin.....	457
		Sparhawk, Andrews v.....	37
Samuel, Rawson v.....	27	Sparrow v. Josselyn.....	233
Sargent v. Parsons.....	176	Spence v. Etter.....	292
Saunders v. Frost.....	115	Sprague, Bank of the Metropolis	
Savidge, Leigh v.....	206	v.....	173, 246-8
Scawin v. Watson.....	352	Star Brick Co. v. Risdale.....	537
Schanck v. Arrowsmith.....	97	Starr v. Cam. and Atl. R. R. Co.....	388
Schenck v. Conover.....	414	——, Leddel's Executor v.....	166
Schenectady, Van Eps v.....	558	State of Iowa v. Eads.....	292
Schooner Sally, the.....	870	State, The. v. Laverack.....	389
Scull v. Reeves.....	143	Steere v. Steere.....	59
Seeger's Executors v. Seeger.....	402	Stevens v. Bagwell.....	370
Semple v. Burd.....	543	—— v. Cooper.....	116
Seward, Giddings v.....	239	—— v. Wilson.....	270
Sewing Machine Companies, the.....	374	Stiles, Hinchman v.....	134
Seymour, Dodd v.....	558	Stillman, Shumway v.....	63
Shafer, Bellinger v.....	51	Stillwell v. McNeely.....	165, 380
Shark v. Cropsey.....	52	Stites, Jones' Executors v.....	236-8
Sharp, Pinner v.....	274	Stone, Payne v.....	51
Shaw, Remer v.....	470	Stone v. Stone.....	260
—— v. Borrer.....	37	Stoker, Hyzer v.....	468
Shelp, Ackerman v.....	468	Stretch, White v.....	111, 495
Shelton, Vanderkemp v.....	43	Strong, Garlick v.....	380
Shepard v. Shepard.....	552	Strong v. Van Deursen.....	246
Sheppard v. Wilson.....	99	Sullivan v. Sullivan.....	395
Shields, Lozear v.....	430	Swan v. Picquet.....	505
—— v. Ashley's Adm'r.....	505	Sweet v. Parker.....	430
		Swett, Wiggin v.....	505
		Swiney, Haig v.....	328

T.

Taft, Todd v.....	271
Taylor, Averill v.....	116
—— v. Morris.....	422
—— v. Neville.....	271
Teague, Goold v.....	365
Teasey v. Baker.....	143
Tenbrook, Updike v.....	154
Terhune v. Colton.	97, 535
Thatcher, Campbell v.....	510
Thaxter v. Williams.....	248
Thomas, West Jersey R. R. Co.v.....	315
Thompson, Davidson v.....	176
—— v. Chandler.....	43
Thornbury v. Bevill.....	274
Thornton, Cobb v.....	106
Thorpe v. Goodall.....	124
Thurlow, Cunynghame v.....	128
Tindall, Conover v.....	557
——, Hutchinson v.....	485
—— v. Den.....	557
Titus, Updike v.....	154
Todd v. Taft.....	271
Torrance, Mollan v.....	375
Torrington, Deering v.....	164
Townley v. Bedwell.....	365
Townsend, Mayer v.....	329
Trecothick v. Austin.....	164
Trenton Locom't'v Co., Bement v.....	451
Tuite, Piers v.....	127
Tuttle, Cutler v.....	525
——, Potter v.....	558
Tyrer, Follett v.....	403
Tyrrel v. Marsh	126

U.

Underhill v. Van Cortlandt.....	273
Updike v. Tenbrook.....	154
—— v. Titus.....	154
Utica Ins. Co. v. Caldwell	163

V.

Vail, Johnson v.....	380
Van Anken, Pardee v.....	116
Van Cortlandt, Underhill v	273
Van Dursen, Strong v.....	246
Van Doren, Large v.....	165
Van Dyke, Brown v.....	179
Van Eps v. Schenectady.....	558
Van Mater, Conover v.....	163
Van Note v. Downey.....	111
Van Orden v. Johnson.....	398
Van Riper v. Williams.....	111
Vanderhaise v. Hugues.....	482
Vanderkemp v. Shelton.....	43

Vansittart, Farrow v.....	457
Varick v. New York.....	170
Vickers, Bowen v.....	557
Vischer v. Vischer.....	64
Vito Viti v. Dixon.....	292
Vredenburgh v. Calf.....	510
Vreeland, New Barbadoes Toll Bridge Co. v.....	557

W.

Wainwright, Dorr v.....	240
Wait v. Wait.....	550
Wake v. Parker.....	380
Wakeman v. Rutland, Duchess of.	68
Walker, West v.....	444
——, Williams v.....	183
Walmesly v. Butterworth.....	126
Walsh v. Durkin.....	354
Wanmaker, Proctor v.....	510
Warburton v. Farn.....	126
Ward, Blair v.....	398
Warren, Hawralty v.....	159, 557
Wartnaby v. Shuttleworth.....	27
Waterworth, Ripley v.....	365
Watson, Scawin v.....	352
Way v. Bragaw.....	353
Weeks, Jaques v.....	543
Weldon, Harrison v.....	510
Wellington, Duke of, Alexander v.....	372
Wells v. Canton Co.....	224
——, Wright v.....	376
Wellesley v. Wellesley.....	20
West v. Walker.....	444
West Jersey R. R. Co. v. Thomas.....	315
Wetmore, Bacot v.....	125
—— v. Midmer.....	125
Wheeler, Cox v.....	441
Whitaker, Faulkner v	163
White, Rowe's Executors v.....	236
—— v. Clarke.....	468
—— v. Stretch.....	111, 495
Whitehead, Potts v.....	274
Whittell v. Dudin.....	329
Whitworth v. Gaugain.....	541
Wigan v. Jones.....	127
Wiggin v. Swett.....	505
Wiggins, Cooke v.....	553
Wilding v. Bolder.....	241
Wilkes, Banks v.....	165
Williams, Thaxter v.....	248
——, Van Riper v.....	111
—— v. Hutchinson.....	52
—— v. Michenor.....	109
—— v. Walker.....	183
—— v. Williams.....	260, 274
Willink v. Morris C. and B. Co.....	19, 21
Wilmington and Sus. R. R. Co., Howard v.....	354

CASES CITED.

xix

Wilson, Cheever v.....	63	Worthington v. McCraer.....	52
——, Sheppard v.....	99	Wright, Bell v.....	270
——, Stevens v.....	270	—— v. Wells.....	376
Winter, Green v.....	51	Wurts' Executors v. Page.....	329
Winterton, Earl of, Farrar v.....	365	Wynne, Clough v.....	236
Winwood, Jones v.....	126		
Wolf, Duffin v.....	109		
Wood v. Charing Cross Railway			
Co.....	323		
Wooden v. Morris.....	391		
Worrall v. Jacob.....	552		

Y.

York, Archbishop of, Metcalf v...	20
Young v. Paul.....	159, 557-9

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

MAY TERM, 1874.

THEODORE RUNYON, ESQ., CHANCELLOR.

AMZI DODD, ESQ., VICE-CHANCELLOR.

WILLIAMSON & UPTON, Trustees, vs. THE NEW JERSEY
SOUTHERN RAILROAD COMPANY and others.

The Raritan and Delaware Bay Railroad Company, to secure bonds issued by authority of their charter, executed a mortgage upon all and singular the railroad of the company, and upon certain branch railroads, and upon "all the railways, branches, ways, rights of way, and other lands, all tracks, bridges," &c., (describing the property in detail,) and all real and personal property held or acquired, or thereafter to be held or acquired by the company for use in connection with the railroads or branches of the company, or with any part thereof, or with the business of the same, including "steamboats, boats, barges, locomotives, tenders, cars, and other rolling stock or equipments, and all machinery, tools, implements," &c., and "all and singular the other personal property of any nature, kind and description whatsoever, belonging to the company, and also all franchises, property, &c., then held or thereafter to be acquired." The name of the company had been changed to "The New Jersey Southern Railroad Company." The trustees under the first mortgage, filed their bill to foreclose, making only the company and the trustees under the second and third mortgages, defendants. They took a decree *pro confesso* against all the defend-

Williamson and Upton v. The New Jersey Southern R. R. Co.

ants, with the usual order of reference. Subsequently, certain of the first mortgage bondholders filed their petition, alleging that the New Jersey Southern Railroad Company, after the execution of the first mortgage, became the actual and substantial owners of certain property for use in connection with their road, among which are the Long Branch and Sea Shore Railroad and its appurtenances, and certain steamboats and other boats, and that afterwards they extended the L. B. and S. S. road, and built with their own funds a pier and costly buildings, to be used in connection with the road. The petitioners claimed that the bill in this cause was insufficient to secure their claim to a lien on this after-acquired property, and prayed to be admitted as complainants with the trustees, on behalf of themselves and all others who should come in, &c., and that the trustees might be instructed to make such amendments to the bill, or to file such supplemental bill as might be necessary to bring before the court for adjudication, the question which might exist as to the actual ownership of the L. B. and S. S. road and its property, and for a receiver of all the roads. *Held—*

1. That the lien of the mortgage attached to all such after-acquired property the instant it was so acquired, and by operation of the covenants in the mortgage, the trustees held it on, and subject to, the trusts of the mortgage.

2. A supplemental bill should be filed by the trustees, distinctly and fully setting up the claim insisted on by the petitioners, and making all parties in adverse interest, defendants. The litigation under the supplemental bill to be confined to the subject matter thereof. The frame of the bill and the parties to it to be settled by the court.

3. Bondholders are not necessary parties to a bill for foreclosure by their trustees, of the mortgage given to secure the bonds. Under the circumstances of this case, the petitioners are not proper parties complainant, but they will be admitted as defendants, if they desire.

4. Question of receivership not passed upon, the trustees having filed their petition that the receiver appointed under another application might be directed to deliver to them as trustees under the mortgage, the possession of the New Jersey Southern Railroad, including the L. B. and S. S. road and its appurtenances.

The Raritan and Delaware Bay Railroad Company were incorporated by an act of the legislature of this state, approved May 3d, 1854. They executed a mortgage to certain trustees to secure the payment of \$1,000,000. Under foreclosure of that mortgage, the mortgaged premises therein mentioned, being the real and personal property and franchises of the company, were sold, and were purchased by the trustees

Williamson and Upton v. The New Jersey Southern R. R. Co.

on or about September 14th, 1869. On the same day the trustees and certain other persons whom they associated with them for the purpose, organized themselves into a corporation under the act entitled "an act concerning the sale of railroads, canals, turnpikes, and plank roads," approved March 5th, 1858. They issued capital stock to the purchasers and their associates to the amount of their respective interests in the new company. On the same day the company executed and delivered to the complainants the mortgage whereon the bill of complaint in this cause is filed, to secure their bonds to the amount in the aggregate of \$2,000,000. All of these bonds were issued. By act of February 16th, 1870, the proceedings by which the new corporation had been created were ratified, and the corporation were recognized, and their name changed to "The New Jersey Southern Railroad Company." Power was also given to issue bonds to be secured by mortgage, to an amount not exceeding \$5,000,000, and the conveyance of the branch of the Camden and Atlantic Railroad, lying between Jackson (now Atco), in the county of Camden, and Atsion, in the county of Burlington, was ratified and confirmed. The mortgage made to the complainants granted, bargained, sold, conveyed, and transferred to them as trustees, as joint tenants and not as tenants in common, and to the survivors of them, and their successors and assigns, all and singular the railroad of the company, or which the company were by law authorized to construct, being the line of railroad theretofore known or thereafter to be known as the Raritan and Delaware Bay Railroad, as the same had theretofore been constructed or thereafter should be constructed from Port Monmouth, in the county of Monmouth, in this state, to the junction thereof with the Camden and Atlantic Railroad at Jackson, then known as Atco, in the county of Camden; together with the branch railroad from Eatontown, in the county of Monmouth, to Long Branch in that county, and the branch railroad from Manchester, in the county of Ocean, to Toms River in that county, and also including that piece of railroad formerly known as the Batsto branch of the

Williamson and Upton v. The New Jersey Southern R. R. Co.

Camden and Atlantic Railroad Company, and extending from Atsion, in the county of Burlington, to the main line of the Camden and Atlantic Railroad at or near Jackson, in the county of Camden; including all the railways, branches, ways, rights of way, depot grounds and other lands, all tracts, bridges, viaducts, culverts, fences and other structures, depots, station-houses, engine-houses, freight-houses, wood-houses, water-stations and other buildings, and all machine-shops, and all real and personal property held or acquired, or thereafter to be held or acquired by the company, their successors or assigns, for use in connection with the railroads or branches of the company or with any part thereof, or with the business of the same; and including all steamboats, boats, barges, lighters, locomotives, tenders, cars and other rolling stock or equipments, and all machinery, tools, implements, fuel and material for constructing, operating, repairing or replacing the said railroads or branches or any part thereof, or any of the equipments or appurtenances of the said railroads or branches or any part thereof, and all machinery of all kinds, and all and singular the other personal property of any nature, kind, and description whatsoever belonging to the company, and all real estate of every kind belonging to them, wheresoever the same might be situated; and also all franchises connected with or relating to the said railroad or branches, or to the construction or maintenance or use of the said railroad or branches, and all the property, franchises, rights, and things, of whatsoever name or nature, then held or thereafter to be acquired by the company or their successors, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad, branches, lands, and premises, or either thereof, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, revenues, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the company, of, in, and to the same, and of, in, and to every part thereof, with the appurtenances. It con-

Williamson and Upton v. The New Jersey Southern R. R. Co.

tained a covenant charging with the lien of the mortgage after-acquired property, and also a covenant for assurance of such property. Default having been made in the payment of the interest, and in providing for the sinking fund, which by the mortgage the company were to establish and maintain, the trustees filed their bill in this court for foreclosure and sale of the mortgaged premises, making only the company and the trustees under the second and third mortgages, parties defendant. None of the defendants having answered, a decree *pro confesso* was made against all the defendants, with an order of reference to a master to ascertain and report the amounts due on the bonds secured by the several mortgages and the order and priority of the mortgages, and whether under the circumstances the mortgaged premises should be sold together, or whether a sale of part only is necessary, and if in parcels, in what parcels and in what order. After the making of that decree the petitioners, holders of bonds secured by the first mortgage to the amount of \$238,000, filed their petition, alleging that the New Jersey Southern Railroad Company, after the execution and delivery of that mortgage, became the actual and substantial owners of certain property for use in connection with their road, among which were the Long Branch and Sea Shore Railroad and its appurtenances, and certain steamboats and other boats; and that after becoming owners of that road they extended it for their own benefit and with their own money, and to the like end built with their own funds a pier and costly buildings to be used in connection with the road. The petitioners, claiming that the bill in this cause is insufficient to secure their claims to a lien on this after-acquired property, pray to be admitted as complainants with the trustees, on behalf of themselves and of all others of the first mortgage bondholders of the New Jersey Southern Railroad Company who are similarly situated and who shall come in and bear their proportion of the expense of this proceeding and of all further proceedings that may be taken for their joint benefit; that the trustees may be instructed by the court to make such amendments to

Williamson and Upton v. The New Jersey Southern R. R. Co.

the bill of complaint, or file such other and supplemental bill as may be needful and proper to bring distinctly before the court, for adjudication, the questions which may exist as to the actual ownership of the Long Branch and Sea Shore Railroad Company, and of its extension, with its piers, ferry-slips and other connected structures, and the steamboats "Plymouth Rock" and "Jesse Hoyt," and other boats above mentioned, and as to the lien of the mortgage of the complainants upon the same and every part thereof; and also such other amendments as may be necessary and proper to set forth and claim a lien upon all the rolling stock, equipments, tools, implements, fuel, material, and other property in possession of the New Jersey Southern Railroad Company at the time of filing the bill in this cause, in which the petitioners include the Long Branch and Sea Shore Railroad and property; and also such other amendments as the petitioners may be entitled to and as may be necessary to secure full and complete justice to all parties; and that a receiver of both the roads, and especially of the Long Branch and Sea Shore Railroad, may be appointed in this cause and during the pendency of this suit. On filing the petition, an order was made requiring the trustees to show cause why the prayer of the petition should not be granted. The trustees answered the petition, alleging that the proceedings were sufficient for the protection of all the interests of the bondholders in the mortgaged premises, as well those owned by the mortgagors when the mortgage was made, as any which had been subsequently acquired. On the argument, they moved for a supplemental order of reference to a master to ascertain and report as to the mortgaged premises, of what they consist, by what title they are held, and how they should be sold.

Mr. Vanatta, for the petitioners.

Mr. B. Gummerc, for the trustees.

Williamson and Upton v. The New Jersey Southern R. R. Co.

THE CHANCELLOR.

The first question which presents itself in the consideration of this application is, whether there is any occasion for the interference of the court with the conduct of this suit. It is well settled that the *cestuis que trust* in such a case as this are not necessary parties. *Willink v. Morris Canal & Banking Co.*, 3 *Green's Ch. R.* 377; *New Jersey Franklinton Co. v. Ames*, 1 *Beas.* 507. The petitioners claiming that the proceedings are defective, ask to be made parties complainant, merely in order that they may thus be the better enabled to watch over, protect and secure their interests in the subjects of the litigation, particularly in reference to the Long Branch and Sea Shore Railroad and its appurtenances, and the steamboats and other vessels mentioned in the petition, property which the mortgagors did not own when the mortgage was made, but which the petitioners insist, was acquired by them after its execution and delivery. The petitioners claim that this property is liable for the payment of the mortgage debt. The trustees, on the other hand, consider the proceedings apt and sufficient to protect and secure all the rights and equities of the petitioners. Of none of this property, however, does the bill make mention. It seeks the foreclosure and sale of the mortgaged premises described in the mortgage, but makes no express claim to any property acquired by the mortgagors after the execution of that instrument. By its terms and covenants the mortgage extends to and covers with the lien it creates, not only the railroad of the mortgagors then constructed, but also all railroads which they thereafter should construct in connection with it, and all real and personal property held or acquired, or thereafter to be held or acquired by the company, their successors or assigns, for use in connection with their railroads or branches, or with the business thereof, including all steamboats, boats, barges, lighters, locomotives, tenders, cars and other rolling stock or equipments, &c., and all the property, franchises, rights and things of whatsoever name or nature, then held or thereafter to be acquired by the mortgagors or their successors, &c. The

Williamson and Upton v. The New Jersey Southern R. R. Co.

mortgagors covenanted and agreed with the trustees, that whenever, and as often as the former, or their successors or assigns, should thereafter acquire any lands, or any equipment, or any other property or things of whatever name or nature, for use in connection with their railroads or of any part of either thereof, or of any other railroad which they then were authorized to construct, or should acquire any other property, rights, franchises or things whatsoever, they or their successors or assigns should and would acquire, possess and hold the same and every part and parcel thereof, upon and subject to the trusts of the mortgage, until conveyance thereof in pursuance of the covenant for further assurance should be duly made and delivered to the trustees or the survivor of them, or their successors in the trust. They further covenanted that they and their successors and assigns would execute, deliver and acknowledge from time to time and at all times thereafter, on request of the trustees, all such further deeds, conveyances and assurances in the law, for the better assuring to the trustees or the survivor of them, and their successors in the trust, on the trust in the mortgage expressed, the railroads, equipments, appurtenances, franchises, property and things thereinbefore mentioned and to which the company then were or might thereafter for any reason become entitled, or which they or their successors or assigns might in any manner acquire; and also, all other property, rights, franchises and things whatsoever, which might thereafter be acquired by the company, their successors or assigns; as by the trustees or their counsel learned in the law, should be reasonably advised, devised or required. If the company acquired, as the petitioners insist they did, after the delivery of the mortgage, the property in question, among which are the Long Branch and Sea Shore Railroad and its appurtenances, and the vessels above mentioned, the lien of the mortgage attached to it the instant it was so acquired, and by operation of these covenants, they held it on, and subject to the trusts of the mortgage. *Metcalf v. Archbishop of York*, 1 M. & C. 547; *Lyde v. Minn*, 1 M. & K. 683; *Wellesley*

Williamson and Upton v. The New Jersey Southern R. R. Co.

v. *Wellesley*, 4 *M. & C.* 561; *Lewis v. Maddocks*, 17 *Ves.* 49; *Fisher on Mortgages* 57; *Coote on Mortgages* 235; *Langton v. Horton*, 1 *Hare* 549; *Pennock v. Coe*, 23 *How.* 117; *Willink v. Morris Canal & Banking Co.*, 3 *Green's Ch. R.* 377; *Field v. Mayor of New York*, 2 *Selden* 179.

Is there reason to believe that the interest of the bondholders requires that the claim they make in this connection, should be specifically set up in order that it may be litigated? It is evident from the petition, that it is likely to be contested. It is important, therefore, to consider on what foundation it seems to rest. That it is of the greatest importance to the bondholders to vindicate this claim, if it is capable of being established, is most manifest, and it is equally clear that it should be done before a sale of that part of the road, about which there is no contest, takes place, for the relation of the Long Branch and Sea Shore Railroad to the rest of the road is such, furnishing as it does its only northern terminus, that the comparative advantage and disadvantage of selling before this claim shall have been disposed of, are too obvious for remark. From the petition and affidavits the following grounds for advancing the claim may be gathered: that the New Jersey Southern Railroad Company, after the delivery of the mortgage, purchased and held, under legislative authority, about sixteen-seventeenths of the capital stock of the Long Branch and Sea Shore Railroad Company; that in the books of the former company, this purchase was entered under the head of "Long Branch and Sea Shore Railroad purchase;" that the New Jersey Southern Railroad Company went into possession of the Long Branch and Sea Shore Railroad and its appurtenances, and continued in such possession for years and up to the time when their property passed into the hands of a receiver appointed by this court, under proceedings in insolvency; that they neither kept any separate account of the earnings or expenses of the road, nor rendered any account or made any return for the use of the road or property, but dealt with them as their own; that they were recognized by the Long Branch and Sea Shore Railroad Com-

Williamson and Upton v. The New Jersey Southern R. R. Co.

pany as the owners of the road ; that, when they went into possession, they discontinued the use of their former terminus at Port Monmouth ; that they expended on construction account on the railroad and property in question, down to and including the year 1873, more than \$300,000, a part of which was spent in building a new pier for freight purposes, and a ferry-slip, both at the terminus of the Long Branch and Sea Shore Railroad, and in constructing about three miles of track at what was the northern and eastern terminus of the road when they took possession ; and that the organization of the Long Branch and Sea Shore Railroad Company, from the time when possession was so taken, was merely formally kept up. These facts are relied upon to show that the New Jersey Southern Railroad Company became the owners of the property in question. The merits of the claim are of course, in no sense before me. I can only look into the case as made by the petitioners and the trustees, to ascertain whether there are grounds to warrant me in directing that the claim be put into a position to be litigated. I think there are such grounds. A sale of the property in question, under the proceedings as they now stand, would leave any rights of the Long Branch and Sea Shore Railroad Company or other contestants, not parties to the bill, unaffected. But it is insisted on behalf of the trustees, that a sale under the proceedings, will pass to the purchaser whatever title the New Jersey Southern Railroad Company have acquired to the property, and that the court may either permit the right to be sold in that way, leaving the purchaser to litigate with the adverse claimants, or may hereafter and before sale, direct that proceedings be taken to litigate the claim. The former course would inevitably result in a sacrifice of the interest of the bondholders. The latter is the proper one, except that the litigation should be commenced at once and be advanced as rapidly as possible. There will be no occasion for disturbing the proceedings already taken. A supplemental bill may be filed, distinctly and fully setting up the claim insisted on by the petitioners, and all the parties in adverse interest may *be called into court* to answer that bill. The litigation under

Williamson and Upton v. The New Jersey Southern R. R. Co.

the supplemental bill will be confined to the subject matter thereof. *Ensworth v. Lambert*, 4 Johns. Ch. 605; *Bignall v. Atkins*, 6 Madd. 369; *Story's Eq. Pl.*, § 334.

The remaining question is, whether the prayer of the petitioners to be admitted as complainants shall be granted. I see no reason for doing so. If the suit which the trustees have brought has not scope enough to answer the purposes for which it was instituted, the court will so direct them in the conduct of it as to remedy the defect. To admit the petitioners as complainants would be to introduce new *magistri litis* who may not be in accord with the present complainants in the management of the cause. The very ground on which the petitioners ask to be admitted is their dissatisfaction with the conduct of the suit by the trustees. They ask to be made co-complainants, in order that they may effect a better management. They are admittedly not necessary parties. Under the circumstances they are not proper parties complainant. They may be admitted as defendants if they desire it. There will be an order directing that a supplemental bill be filed, setting up the claim to the Long Branch and Sea Shore Railroad and property, and any other disputed property, which the trustees or the petitioners may, on reasonable apparent grounds, claim to be subject to the lien of the mortgage. The frame of the bill and the question as to who shall be parties to it, will be settled by the court, on notice to the trustees and petitioners. In order to a designation and description of the mortgaged premises to which no adverse claim is made, the reference asked for by the trustees is necessary. It will, of course, be confined to that property. The trustees having, since the argument of this motion, filed their petition, praying that the receiver appointed under the "act for the relief of citizens on the line of any railroad that has or may hereafter fail to operate," may be directed to deliver up to them as trustees under the mortgage, the possession of the New Jersey Southern Railroad, including the Long Branch and Sea Shore Railroad and its appurtenances, of which he is now in possession, I deem it unnecessary to pass upon the application of the petitioners for the appointment of a receiver.

Hewitt v. Kuhl.

HEWITT vs. KUHLE

1. That a plaintiff in a suit at law to recover moneys due upon certain notes and checks, has assigned for full value a mortgage given to him by the defendant in that suit, and intended as collateral security merely, furnishes no ground for injunction to restrain the prosecution of the suit. The assignment would be a payment *pro tanto*, of which such defendant might avail himself in the suit at law.

2. To maintain an equitable offset the party seeking the benefit of it must show some equitable ground for being protected against his adversary's demand. The mere existence of a counter demand is not enough. Nor will the mere pendency of an account, out of which a cross demand may arise, confer the right to an equitable offset.

3. In a suit seeking an equitable offset upon an account between former partners and an injunction to restrain a suit at law by the defendant against the complainant upon notes given in course of partnership transactions, the mere assertion of a counter demand will not hold the injunction issued upon filing the bill. Some account must be given, or statement made, or facts alleged, from which the court can judge whether the complainant would probably be able to establish his claim.

On motion to dissolve injunction.

Mr. A. V. Van Fleet and *Mr. G. A. Allen*, for the motion.

Messrs. Berry & Lupton, contra.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendant from prosecuting two suits at law, brought by him in the Supreme Court of this state. One of them is against the complainant and Augustus B. Smith and Jacob L. Martin, upon a promissory note for \$250, dated December 10th, 1869, made by Smith and Martin, as partners, to the order of the complainant, and by him endorsed to the defendant, and two bank checks drawn by Smith and Martin, as partners, on the Union National Bank of Rahway, payable to the order of the complainant, and by him endorsed to the

Hewitt v. Kuhl.

defendant, one dated December 24th, 1869, for \$4000, and the other dated December 30th, 1869, for \$2200. The other suit is against the complainant alone, and is brought to recover the amount claimed to be due on two bank checks, drawn by the complainant on the bank above named, and dated December 20th, 1869, payable to the order of the defendant, one for \$1000, and the other for \$500. The bill also prays an account of certain transactions in which the complainant and defendant were interested, each being entitled, according to their agreement, to half the profits thereof. These transactions were the purchase of certain timber lands in this state, the cutting off and selling the timber, and then selling the land. It appears by the answer that they included also the purchase of certain standing hickory trees, felling them, and selling the wood, and the purchase and sale of a considerable number of spokes. Some of the land referred to was purchased by the defendant, and the rest was claimed by the complainant as his property. The bill alleges that soon after the arrangement for the business was made between the parties, the complainant gave the defendant a mortgage, made by the former, on certain real estate belonging to him, in the city of Elizabeth, in this state, for the sum of \$2000; that that mortgage was intended and understood to be collateral security merely for any indebtedness of the complainant to the defendant, which might thereafter accrue; that the defendant has assigned it away for its full value; and that after the giving of the checks and note in suit, the complainant, who then had the management of the business, remitted to the defendant, with a view of paying off his indebtedness, "divers large sums of money, amounting in the aggregate to many thousands of dollars, and greatly exceeding the proportion to which the defendant was entitled for his share of the profits." The bill may be regarded as claiming, (although it does not formally do so,) an allowance upon that indebtedness of the amount of the mortgage, and of the excess of the last mentioned payments over the defendant's share of the profits.

Hewitt v. Kuhl.

On filing the bill an injunction was issued. The defendant has answered, and now moves to dissolve the injunction on bill and answer, and affidavits.

The view I take of the case renders it unnecessary to consider the question raised on the argument, as to the nature of the business relation of the parties toward each other, whether they were partners *inter sese* or not. They agree as to the character of the transactions, that they were jointly interested in them, and as to the extent of their respective interests. It is also undisputed that no final settlement has been made between them. Nor is any question made as to the defendant's right to recover from the complainant the amount of the checks and note in suit, but for the allowances claimed in respect to the mortgage and remittances before referred to. As to the former it is enough to say that the answer denies that it has been assigned for value, but alleges that it was assigned to a creditor of the defendant as collateral security for a precedent debt, and that by reason of the large amount of prior encumbrances on the mortgaged premises it is of no value. But if the allegation of the bill were true that it has been assigned by the defendant for its full value, the complainant might avail himself of the fact in the suits at law. It would be a payment *pro tanto*.

The remaining equity depends on a claim of equitable offset. Beyond the general statement, that with a view to the payment of the claims now in suit, the complainant remitted to the defendant, out of the proceeds of the business, "large sums, amounting in the aggregate to many thousands of dollars, and greatly exceeding the proportion to which the defendant was entitled for his share of the profits," there is nothing in the bill on which this claim of equitable offset is based, and even this meagre and indefinite statement is not verified except by the complainant's general affidavit to the truth of his acts set forth in the bill. To maintain an equitable offset, the party seeking the benefit of it must show some equitable ground for being protected against his adversary's demand. The mere existence of a counter demand is

Hewitt v. Kuhl.

obviously not enough. Nor will the mere pendency of an account, out of which a cross demand may arise, confer the right to an equitable offset. *Rawson v. Samuel*, 1 Cr. & Ph. 179; *Wartnaby v. Shuttleworth*, 1 Jur. 469; *Dodd v. Lydall*, 1 Hare 337; *Gordon v. Pym*, 3 Hare 223; *Duncan v. Lyon*, 3 Johns. Ch. 351, 358; *High on Inj.*, § 142; *Kerr on Inj.* 66.

I find nothing in this bill to warrant me in restraining the defendant from proceeding to recover his claims at law. The complainant does not even state his belief that on the accounting for which he prays, there will be a balance found in his favor. And if he had not only so stated, but had sworn to it also, this would not, of itself, have been sufficient ground on which to hold the injunction, for it would still have been but the simple assertion of a counter demand, as to the probable merits of which the court is entirely in the dark. No account is given, no statement made, nor any facts alleged from which the court could even judge whether the complainant would probably be able to establish his claim. The statements of the bill in this connection are, except as to the amount alleged to have been received on the transfer of the mortgage, (and this is wholly denied by the answer,) a mere assertion of the existence of a counter demand, without particulars, and without statement or even conjecture as to the amount.

On the other hand, the defendant denies that anything would be found to be due from him to the complainant on an accounting, but alleges, that on the contrary, the balance would be largely in his favor.

The injunction must be dissolved with costs.

Myer v. Myer.

MYER vs. MYER and others.

Motion to discharge writ of *ne exeat* refused, on the ground of insufficiency of the answer and affidavits.

On motion, on bill, answer and affidavits, to discharge writ of *ne exeat*.

Mr. A. W. Culler, for the motion.

Mr. J. J. Cutler, contra.

THE CHANCELLOR.

The complainant and the defendant, William Myer, were partners in business as butchers and dealers in meat in Morristown, under the firm of William Myer & Co., from some time in April, 1868, to the 8th of October, 1873. They were to share the profits and losses, equally. On the last mentioned day they dissolved their co-partnership by mutual consent. The business was continued by the defendants, William Myer and George W. Hunt, under the firm of Myer & Hunt. On the dissolution of the firm of William Myer & Co., William Myer, according to the bill, requested that their partnership books and accounts should be left at the store of the new firm of Myer & Hunt, and that he should be permitted to collect the money due on them. This arrangement was sought on the ground that thus the money would be conveniently collected, and that, too, without prejudice to the business. The debts of the concern amounted to about \$2600. The assets, other than the money due to the firm, were divided between the partners, and they agreed that William Myer should collect the debts due the concern, (amounting, according to complainant's estimate, to about \$3000,) and deposit the money in the First National Bank of Morristown, to meet the notes and obligations of the firm as they should mature, paying such debts of the firm as should

Myer v. Myer.

presented to him for the purpose at the store of Myer & Hunt. The books and accounts went into his hands under his arrangement. The complainant alleges that, to his surprise, he saw an advertisement of the date of December 22d, 1873, announcing the dissolution of the firm of Myer & Hunt, and that the business would be continued by Hunt. On inquiring, he says, he found that the money due to the firm had been, to a great extent, collected by William Myer, and that he had left unpaid of the debts due from the concern about \$1600, and had appropriated to his own use a large amount of the money collected by him. The complainant alleges and swears, that immediately after seeing that notice, he went to see William Myer, and asked him to account for the money he had collected, but that he refused to do so; that William Myer then admitted he had received a large amount, but refused to say definitely how much; that the complainant asked him what he had done with the money, and he said he had paid it to his father, who resides in Petersburg, Virginia; that the complainant asked him to pay his part of the partnership debts, and he replied that he had nothing to pay with, and could not pay any part of those debts.

It appears that, on the dissolution of the firm of Myer & Hunt, William Myer sold out his interest in that concern to Hunt, and by agreement became a clerk of the latter in the business. His reason for selling was, he says, that he wanted money to pay his individual debts, and to raise it he sold out to Hunt. The complainant swears, that on the 2d day of January, 1874, William Myer admitted to him that he had converted all his property into money, and the complainant further swears that William Myer admitted to him, that he intended to leave this state and go to his father, in Virginia. Thomas M. Carlisle, whose affidavit is annexed to the bill, was a creditor of the firm of William Myer & Co. He came out from New York on the day last mentioned, to collect the money. He swears he saw Hunt, and that Hunt then told him that William Myer had sold out to him for \$2000, and

Myer v. Myer.

had sent the money to his father, in Virginia, and intended to remove there himself.

The complainant swears, that he has been compelled to pay a large part of the remaining indebtedness of the firm of William Myer & Co.

The bill is filed against William Myer and his father, and George W. Hunt. It charges that they have conspired to defraud the complainant in the premises. It prays an account from William Myer. On the filing of the bill a *ne exeat* was granted. William Myer has answered. His father and Hunt have not. Motion is now made to discharge the *ne exeat* on the answer and the affidavits (among which is Hunt's) annexed to it. William Myer flatly denies that he had the conversation with the complainant on the 2d of January, 1874, and Hunt swears that he had no such conversation with Carlisle as that to which the latter testifies. Besides the affidavits of William Myer and Hunt, those of Ira M. Hurlburt and Henry H. Becker are attached to the answer. The former swears that he was in the employ of Myer & Hunt prior to the dissolution of that firm, and was cognizant of the negotiations in reference to the purchase of the interest of William Myer in the partnership, and that at no time did he hear it stated that Myer was about to leave the state, but on the contrary it was understood and agreed, that he was to remain in Hunt's employ up to April 1st, 1875. He further says, that he never heard of William Myer's intending to leave the state until he heard the complainant's bill read. He is still in Hunt's employ. Becker is a druggist, whose place of business is near that of Hunt. He swears he was present at the sale of William Myer's interest to the former, and was cognizant of the negotiations attending the sale; that he never heard of any intention on the part of William Myer to leave this state, but, on the contrary, the arrangement was, that he was to remain in Hunt's employ, and that he first learned of such intention from the bill of complaint in this cause. Both Hunt and William Myer swear that the latter has made an arrangement to con-

Myer v. Myer.

tinue in the employ of the former till April 1st, 1875. Whether this arrangement was made before or after the *ne exeat* was served, does not appear.

The answer leaves no doubt of the truth of the statement of the bill in regard to the agreement between the complainant and William Myer, on the dissolution of their copartnership, the amount of the debts due from and to the concern, or the agreement as to the books and accounts. That William Myer made collections upon those books and accounts is admitted. He professes to be unable to tell to what amount, because of the fact that the books, as he alleges, are in the hands of the complainant.

The complainant is entitled to an account of these moneys and of the disbursement of them. I am far from being satisfied that he and Carlisle have been guilty of willful falsehood in their affidavits—that they have deliberately sworn to conversations (the former, to one alleged to have taken place between him and William Myer, and the latter, to one which he swears he had with Hunt,) which never took place at all. On the other hand, the conduct of William Myer in the transaction, impresses me unfavorably. So, also, does that of Hunt. The former had in his hands the books and accounts of William Myer & Co., entrusted to him at his request, for collection for the benefit of himself and the complainant. He proceeded to make collections upon them, and as complainant alleges, made large collections thereon. Very shortly after the end of the sixty days, within which the collections were, by the agreement between him and the complainant, to be made, and at the end of which time an account was to be made, and the unpaid balance of the debts to be paid off by the partners, he sold out his interest in the business of his new firm and became, as he says, clerk to one who was clerk for William Myer & Co., when he and the complainant were in partnership, and at the time of the dissolution of that firm. His reason for this action is that he was “called on to pay individual debts of his own, and required ready money and

Morris v. Woodward.

means." He adds that he received the money and paid it to his creditors.

That his action in this last dissolution was sudden, and a surprise to the complainant, is not denied. It does not appear that he had been sued or threatened with suit, or that his creditors were pressing him for payment of their demands. Nor does it appear, except from the general statement above quoted, that he had any creditors. His conduct towards the complainant is suspicious and indicative of bad faith. In answering the bill he has made no effort to state the amount of his collections or of his payments, with any accuracy or attempt at exactness. His excuse is, that on "a certain day" the complainant took away the books from the store, and had them when the bill was filed. He does not allege that he requested the use of the books, to make up an account or statement for his answer, or that he had been refused the use of them, or that any necessary or desirable facility had been denied him in that connection. The case on which the writ was granted is not overthrown by the answer and its accompanying affidavits.

The motion is denied, with costs.

MORRIS vs. WOODWARD and others.

1. A refusal to adjourn a sale, in the exercise by the sheriff of a reasonable discretion, is not sufficient ground for setting the sale aside.

2. A requirement that twenty per cent. of the purchase money shall be paid at the close of the sale, and satisfactory security be given for the balance, will not suffice to set aside the sale, where no complaint was made of the terms, nor any relaxation of them requested, and where it does not appear that any one was prevented from bidding by reason of them.

3. Where an agreement is made by the complainant with a mortgagee defendant, present at the sale and intending to buy in the property to protect his claim if necessary, that if such mortgagee would not bid, and would permit him to buy the property, he would pay his claim, and by reason of the latter not bidding in pursuance of such agreement, the property

Morris v. Woodward.

brought much less than it otherwise would have done, thereby throwing upon the mortgagor, against whom the complainant had taken a personal decree for deficiency, a liability for a greater deficiency, such agreement is a fraud upon the mortgagor, which vitiates the sale.

On motion, on petition and affidavits, and rule to show cause, to set aside a sheriff's sale of mortgaged premises.

Mr. S. M. Schanck, for the motion.

Mr. James Wilson, contra.

THE CHANCELLOR.

The defendant, Charles H. Woodward, owner of the equity of redemption in the mortgaged premises, moves to set aside a sale of those premises, (a mill property of the value of about \$10,000,) made by the sheriff of Monmouth. The motion is based on the allegation that the sale was conducted illegally, because the sheriff refused to adjourn it at the request of Woodward, and imposed severe and forbidding terms of sale, and on the further ground that the complainant, who was the holder of the second and fourth mortgages, and who purchased the property at the sale for \$5000, prevented competition by an agreement with the holder of the third mortgage, who was there to protect his claim by bidding on, and even buying in the property if necessary. The case was one in which the sheriff ought to have granted the adjournment, if there had been no special reason to the contrary. The property was valuable; the adjournment was asked for on the day fixed for sale in the notice, and there had, therefore, been no adjournment; the petitioner had been engaged for some days previous to that time as a juror, and so, by his enforced attention to public business, had been prevented from looking after his interest in this matter as he otherwise would have done. He had expectations, apparently well founded, of raising the money necessary to pay off the execution, if a few days were given to him for the purpose. The sheriff, however, refused, and his refusal would have

Morris v. Woodward.

been unreasonable but for the fact that the petitioner had committed waste on the premises to such an extent as to render it necessary for the complainant to apply to the court to restrain him. The sheriff had refrained from advertising the property, for some weeks after the execution came to his hands, to afford the petitioner an opportunity to arrange the matter and so prevent a sale. The complainant protested against an adjournment. Under these circumstances I am not willing to question this exercise of discretion. The terms of sale were unusually severe, although the sheriff says they were and had been his ordinary conditions so long as he had been in office, and he had then been in office over two years. They required the payment of twenty per cent. of the purchase money at the close of the sale, and satisfactory security for the balance. The latter condition seems to me to be unnecessarily hard, and it must in many cases tend to prejudice the sale. But no complaint was made of the terms at the sale, nor was any relaxation of them requested, nor does it appear that any one was prevented from bidding by reason of them. The property was put up for sale twice on the same day. The first time it was struck off to John H. Silvers, a brother-in-law of the petitioner, at \$9000. He failed to comply with the terms. He appears to have been unable to pay the twenty per cent., and the property was again set up, and it was then sold to the complainant for \$5000. The holder of the third mortgage bid, at the first sale, \$7500. It was necessary that the property bring about \$7000, to cover his claim. Between the two sales the complainant approached him and requested him not to bid on the property, and offered to pay his claim if he would not bid. To this he acceded, and when the property was put up the second time, he, in view of the bargain made between him and the complainant, did not bid, and the consequence was that the latter bought the property at his single bid of \$5000. That agreement was contrary to the policy of the law. *Fuller v. Abrahams*, 3 Brod. & Bing. 116; *Martin v. Ranlett*,

Dewey's Executors v. Ruggles.

5 *Rich. (Law)* 542; *Mills v. Rogers*, 2 *Littell (Ky.)* 217; *Smith v. Greenlee*, 2 *Dev.* 126.

In judicial sales at auction, no practice which will tend to prejudice the sale should be permitted, least of all should he for whose benefit the property is sold, be allowed to reap the advantage of such practice on his part. In the present case the complainant took a personal decree against the petitioner for deficiency. This is an additional reason for setting aside the sale, which his agreement to prevent competition has deadened, at least to such an extent as to make the deficiency, to the payment of which the petitioner is subjected, greater than it otherwise would have been. Besides, it appears that the complainant, on paying the claim of the third mortgagee, took an assignment of it, which he now holds. The agreement was a fraud upon the petitioner.

The sale will be set aside.

DEWEY'S EXECUTORS vs. RUGGLES.

1. A charge of all testator's debts and funeral and testamentary expenses upon all his estate, real and personal, not otherwise specifically bequeathed, is equivalent to a trust for sale of all the real and personal estate not otherwise specifically bequeathed, for the purpose of paying those debts and expenses; and the executor's deed therefor will pass to the purchaser, both the legal and the equitable estate.

2. The general rule is, that a purchaser is not bound to see to the application of the purchase money when the testator's debts are charged generally upon his estate. There are exceptions to it, where there is a breach of trust by the executors, and the purchaser is a party to it, and where the purchase is after the institution of a suit which takes the administration of the estate out of the hands of the trustee. There is no such allegation here.

On final hearing on bill and demurrer.

Mr. McGill, for complainant.

Mr. Lippincott, for defendant.

Dewey's Executors v. Ruggles.

THE CHANCELLOR.

Catalina Dewey, the testatrix, died April 17th, 1871. By her last will and testament, dated August 17th, 1870, she appointed her son-in-law David Young, and her son Samuel Dewey, executors and trustees thereof. By a codicil made a few days afterwards, she appointed her daughter Catalina, executrix and trustee with her son and son-in-law. By the first section of the will, she directs her executors and trustees to pay all her debts, funeral and testamentary expenses, as soon as may conveniently be done after her decease, and charges with the payment of those debts and expenses, all her estate, real and personal, not therein otherwise specifically bequeathed. After bequeathing her household furniture pictures and silver to her daughter Catalina, she gives all the rest, residue and remainder of her estate, both real and personal, not thereinbefore disposed of, to her children, to be divided into five equal parts or shares, to be distributed and retained in trust by her executors in the manner thereafter directed, that is to say: one-fifth part to be paid to her daughter Catalina, another to be paid to her daughter Helen another to be paid to her son Samuel, another to be invested and held in trust by her executors or the survivor of them for the benefit of her son, John V. D. Dewey and his children to whom she bequeaths that part or share, after his death directing that he have the annual interest and profits thereof for his life. The other fifth is to be invested and held in trust in like manner by the executors or the survivor of them for the benefit of her son, A. Reed Dewey, the annual interest and income to be paid to him by them or the survivor of them, for his life, and after his death, the share to be "paid and transferred to his heirs-at-law, him surviving." The testatrix requests that in case of the return of her son Horatio her "children or heirs surviving, pay to him individually, the sum of \$1000 each," and she directs that the debts due her from her five children to whom the shares are given, shall be taken into and constitute part of the residue, and that they

Dewey's Executors v. Ruggles.

shall be charged to and be reckoned as part of their respective shares. At her death, she was seized of two lots of land in Jersey City. The complainants, on the 4th day of March, 1872, entered into an agreement in writing with the defendant, by which they agreed to sell and convey this property to him at a price therein named, and he, on his part, agreed with them to buy it of them accordingly. The defendant, not being satisfied that the complainants could make a good title to him for the premises, refused to comply with his agreement, and the bill in this cause was therefore filed against him to compel a specific performance. The defendant demurred on the ground of want of equity.

The question presented is simply whether the complainants have power under the will to sell the premises. The case is free from allegation that the executors, in selling, are committing a breach of trust, or that the purchaser has reason to believe that they are doing so, or that the debts and expenses charged upon the land are all paid, or that the purchaser even has reason to doubt whether they are not all paid. The complainants insist that they have power to sell under the will, and base their claim on the first section, by which the debts, funeral and testamentary expenses, are charged on the whole of the testatrix's real and personal estate, except the household furniture, pictures and silver, which are specifically given to her daughter Catalina, and expressly excepted by the will from that charge.

This charge is equivalent to a trust for sale of all the real and personal estate, with the exception referred to, for the purpose of paying those debts and expenses. *Bateman v. Bateman*, 1 *Atk.* 421; *Ball v. Harris*, 3 *Jur.* 141; *S. C.*, 4 *My. & Cr.* 268; *Story's Eq. Jur.*, § 1131; *Elliot v. Merryman*, *Lead. Ca. in Eq.* 45, and notes; *Gardner v. Gardner*, 3 *Mason* 178, 219, 220; *Andrews v. Sparhawk*, 13 *Pick.* 393; *Shaw v. Borrer*, 1 *Keen* 559; *Sugd. on Vend.* 660.

The executors have power to sell, and the purchaser who takes title from them will not be bound to see to the application of the purchase money—that is to say, their deed will

Smith and Martin v. Kuhl and Hewitt.

pass to him both the legal and the equitable estate. The general rule is, that a purchaser is not bound, where the debts are charged generally, to see to the application of the purchase money. There are exceptions to it, where there is a breach of trust by the executor and the purchaser is a party to it, and where the purchase is after the institution of a suit which takes the administration of the estate out of the hands of the trustee.

There will be a decree for specific performance.

SMITH and MARTIN vs. KUHL and HEWITT.

1. When a party seeks relief in equity from liability for acts done under his authority, on the ground that the authority was fraudulently obtained, he must show wherein the fraud consists; the mere allegation of fraud is not sufficient.

2. A, who has had joint business with B, to whom C has lent his notes and checks to be cashed for B's benefit, cannot, on his bringing suit at law against C on such notes and checks of which he has become the owner in his own separate right, be required to plead with B in order that it may appear whether there is not something due from him to B in their joint business which may be applied to the payment of the indebtedness of C to A on the notes and checks. Such is not the object of an interpleader.

On motion to dissolve injunction.

Mr. A. V. Van Fleet and *Mr. G. A. Allen*, for the motion.

Mr. C. Parker, contra.

THE CHANCELLOR.

This suit is brought to restrain the defendant, Kuhl, from prosecuting against the complainants an action at law, which he has commenced in the Supreme Court of this state against them and the defendant, Hewitt, on two promissory notes made by the complainants in their firm name of Smith and

Smith and Martin v. Kuhl and Hewitt.

Martin, each for \$250, and payable to the order of Hewitt, and by him endorsed to Kuhl, one dated December 10th, 1869, and payable at three months, and the other dated March 14th, 1869; and two bank checks purporting to have been drawn by the complainants in their firm name, on the Union National Bank of Rahway, to the order of Hewitt, one dated December 24th, 1869, for \$4000, and the other dated December 30th, 1869, for \$2200. These checks were endorsed by Hewitt, and afterwards by Kuhl, who claims to have endorsed them merely for Hewitt's accommodation, and to have been compelled to pay them after protest. It is admitted that they have not been paid by the drawers or the bank on which they were drawn, or by Hewitt. It is admitted, also, that the notes have not been paid. It was suggested, however, by complainant's counsel on the argument, that one of the notes was given merely in renewal of the other. The injunction was prayed on the ground that the notes were made and the checks signed merely for Hewitt's accommodation; that the latter were signed in blank, and delivered to him on an understanding and agreement between the complainants and him, that they were to be filled up only for small amounts, while in fact it appears that, in violation of the agreement, as the complainants allege, they were filled up for large sums; that the notes and checks were used in the joint business of Hewitt and Kuhl, and therefore the defendant, who was fully cognizant of their character as accommodation paper, ought not to be permitted to enforce payment of them against the complainants; that Hewitt claims that they have, in fact, been paid by the amount of a mortgage which he executed and delivered in December, 1869, to Kuhl, for \$2000, as collateral security for any indebtedness on his part to Kuhl, and which, he alleges, Kuhl assigned away for full value, and by the amount of certain remittances which he claims to have made to Kuhl of money, the proceeds of their joint business in excess of Kuhl's just share of the profits, and that the letter of attorney by the alleged authority of which Kuhl filled up the checks, was fraudulent.

Smith and Martin v. Kuhl and Hewitt.

It is unnecessary to consider here so much of the case as rests on the claim of equitable offset in favor of Hewitt against Kuhl in respect of the claim of a balance which, it is alleged will be found to exist in Hewitt's favor, on an account being had between him and Kuhl of their joint business. That has already been disposed of in the opinion delivered in the suit in this court, brought by Hewitt against Kuhl, to restrain him from prosecuting the suit at law above mentioned, and another one pending in the same court, brought by him against Hewitt on another note and check, made and drawn by him in favor of Kuhl.

It was then held that the bill made no claim of equitable offset which could be entertained. The claim for allowance of the amount of the mortgage was also passed upon. It remains to consider the grounds peculiar to this case. That Kuhl was aware of the character of the notes and checks—that he knew they were accommodation paper, is not denied; but the answer denies that they were used in the business of Hewitt and Kuhl. It appears from the answer and affidavits that the checks were used to make Hewitt's account good with the Hunterdon County National Bank for drafts he had made on that bank. Such use was in accordance with the authority given by the letter of attorney. It also appears that the greater part of the amount of these drafts—indeed all of it but about \$1500—was received by the complainants themselves, and that another large check, dated December 28th, 1869, for \$1200, was, on or about that day, filled and used for the like purpose, under the like authority, to the benefit of the complainants, who, after it was protested for non-payment, gave their note for the amount of it to the Hunterdon County National Bank, who held it. Kuhl seems to have endorsed these checks without consideration, merely for the accommodation of Hewitt, and in the confidence that they would be duly honored or provided for by Hewitt or the complainants, and to have been compelled to pay the same. The notes he discounted for Hewitt. If, as the complainants insist, Kuhl used the notes and checks in the joint business

Parker v. Child.

of himself and Hewitt, the facts can be shown as well on the trial at law as it can be in this court. If one of the two notes was given in renewal of the other, that, also, can be as well shown there as here.

It is urged on behalf of the complainants that, in view of the fact that they insist that the letter of attorney is fraudulent, this court should hold the injunction. But they neither state nor suggest wherein the fraud consists, and for aught that appears, the fraud, if any there be, can be as readily proved at law as it could be in this court. There is still another aspect of the case. The bill prays that Hewitt and Kuhl may be required to interplead in order that an account may be taken of the transactions of their joint business, to the end that it may appear whether there is not a balance due to Hewitt thereupon; that is, the complainants ask that Kuhl may be prevented from prosecuting his suit as against them, until it may be ascertained in this court whether there is not something due to Hewitt from him which may be applied to the debt due to Kuhl from them. This is not the subject of an interpleader, and no such relief can be granted.

The injunction will be dissolved, with costs.

PARKER vs. CHILD and others.

1. It does not necessarily follow, that by a mortgagee becoming the purchaser of the premises and taking title therefor at the sale under the foreclosure, his mortgage is merged or extinguished in his legal title.

2. A purchaser, (first mortgagee,) at a sale under a foreclosure suit upon his mortgage, to which suit a second mortgagee was, by oversight, not made a party, is entitled to require the second mortgagee to redeem in a reasonable time, or to be foreclosed.

3. Such purchaser, as prior encumbrancer, must be redeemed, not only to the full amount due for principal and interest upon his mortgage, but also to the full amount of the purchase money paid by him over and above such amount, the excess having been appropriated in payment of claims prior to the second mortgage, and the purchaser being thereby subrogated to the rights of the holders of those claims.

Parker v. Child.

4. The purchaser of premises, not a party to the suit and during his occupation of the premises, and whose mortgage is junior to the mortgage of the complainant, after he has been notified of the suit.

On final hearing on pleadings and proofs.

Mr. B. G. ... for complainant.

Mr. J. Henry ... for Child.

THE CHANCELLOR.

This is a suit brought to compel Child, who is a mortgagee, to redeem the mortgaged premises which sold under foreclosure of the complainant's mortgage. Child was not a party to the proceedings, neither the plaintiff nor his solicitor being aware of the existence of Child's mortgage, which appears however to have been registered when the bill in the foreclosure suit was filed. At the sale under the execution in that suit, the complainant bought the property at the price of \$4000, and to deal from the sheriff accordingly. The execution was to raise and pay the complainant, principal, \$7000, interest, \$901.55, and costs, \$111.50, besides interest on the first of those items from the date of the master's report, at the Freehold National Banking Company, judgment encumbrancers, their debt of \$576.25, with interest thereon from the same date. The amount due to the complainant on bank on execution, including complainant's costs, amount with the sheriff's execution fees, to about \$8000. A number of other encumbrancers, except Child, were made parties to the suit. They were all judgment creditors whose lien was junior to that of the second mortgagee. None of them, except the bank, appeared in the suit, or before the master, and consequently the claims of none of them, except the bank, were reported on. The complainant's mortgage is still uncancelled of record.

The bill seeks to compel the defendant, Child, to re-

Parker v. Child.

complainant's mortgage and the judgments. Holmes is defendant by reason of his having held, when the bill was filed, a mortgage given by the complainant to him, on the same premises, after the complainant received his money from the sheriff. The defendant, Child, insists that the complainant is not entitled to the relief he seeks, and that by his purchase of the premises and taking title therefor at the sale after the foreclosure, the complainant's mortgage was merged or extinguished, and that the complainant now holds the title subject to the lien and encumbrance of Child's mortgage. I deem it unnecessary to discuss the question so fully argued, as to whether there is any merger or extinguishment in this case. It is clear that under the circumstances it would be held that there is none. *Forbes v. Mofatt*, 384, 394; *Mocatta v. Murgatroyd*, 1 P. W. 393; *Wan v. Emans' Admr's*, Sarton 100, 110; *Gibson v. Gibson*, 3 Pick. 475; *Hunt v. Hunt*, 14 Pick. 374, 384; *Smith v. Smith*, 2 Vroom 325, 327; *Mulford v. Peterson*, 127, 131; *Clos v. Boppe*, 8 C. E. Green 270; *Wan v. Chandler*, 7 Greenl. 377, 380, 381; *Cooper v. Cooper*, 1 Dana 23; *Benedict v. Gilman*, 4 Paige 58; *Van Hook v. Shelton*, 11 Paige 28.

The decision of this cause depends on other considerations. The foreclosure was complete and effectual as far as all except Child, the second mortgagee, was concerned. As to Child, it was a nullity, and left his rights and equities entirely unaffected. By the sale the complainant, as purchaser, acquired the title of all the parties to the suit, and he holds it subject and subject only to the rights and equities of the second mortgagee, who was not a party. Now, what are the rights and equities? They are the right to redeem the premises prior to the second mortgage, and to an account of that end from the complainant of the rents and profits since the latter has been in possession, and to have the first mortgage cancelled of record by the complainant. The court will compel the second mortgagee to exercise his right of redemption within a reasonable time, under a penalty of

Parker v. Child.

being foreclosed of his equity. *Benedict v. Gilman*, 4 Paige 58. In the present case the first mortgagee in foreclosing his mortgage, omitted, not from design, but from the oversight of his solicitor, to make the holder of the second mortgage a party to the suit. Neither the complainant or his solicitor had any knowledge of the existence of the second mortgage till after the sale under the foreclosure had taken place. To this oversight the extreme improbability of there being any additional encumbrance upon the property, which was already encumbered to the amount of \$18,000, and which does not appear to have been sacrificed at the price of \$9000, doubtless contributed. The complainant, after his purchase, entered into possession, and, as the bill alleges, made certain improvements of the value of about \$300 upon the premises. There is no proof, however, on the latter point. He has paid off by means of the money he paid for the property at the sheriff's sale, the amount of one of the encumbrances, (the judgment of the bank,) subsequent to his, and prior to the second mortgage. There was a surplus of about \$400, which by the execution was ordered into court. It does not appear whether it was ever paid over to any one, or not. It would have been paid to the senior judgment creditor on due application. It is equitable that under the circumstances the second mortgagee should be required to redeem in a reasonable time, or be foreclosed. I will therefore put him to such alternative. He must redeem the complainant as prior encumbrancer, not only to the full amount due for principal and interest on his mortgage, but also the amount due on the judgment of the bank, to whose rights in respect thereto the complainant is entitled to be subrogated, and also any amount which may have been paid out of the purchase money paid by him to the sheriff upon any encumbrance prior to the second mortgage, to the rights of the holder of which encumbrance he will be subrogated *pro tanto*.

The complainant must account for the rents and profits during his occupation of the premises, and cancel the Holm mortgage of record. If the second mortgagee shall elect

Clinton Station Manufacturing Co. v. Hummell.

redeem upon these terms, and shall serve a written notice to that effect on the complainant's solicitor within thirty days after service upon him of a copy of the decree to be entered on this decision, it will be referred to a master to ascertain and report the amount due the complainant on the principle above stated, and in that case all further questions and directions will be reserved. But if he fails or neglects to give such notice of such election, within the period above prescribed, there will be a decree of strict foreclosure against him.

In either event, neither party will be required to pay costs to the other.

THE CLINTON STATION GENERAL MERCHANDISE AND
MANUFACTURING COMPANY *vs.* HUMMELL and wife.

The avails of a wife's labor in her husband's business belong to him, and property purchased therewith, in the name of the wife, cannot be held by her against her husband's creditors.

On final hearing on pleadings and proofs.

Mr. G. A. Allen, for complainant.

Mr. J. N. Voorhees, for defendant.

THE CHANCELLOR.

This is a creditor's bill. The complainants on the 9th of October, 1871, recovered a judgment in the Supreme Court of this state, against Cornelius S. Hummell, for \$2089.44 damages and costs, on which they issued a *feri facias de bonis et terris*, under which they caused a levy to be made by the sheriff of Hunterdon county, on the right, title, and interest of the defendant in certain land and premises, being a

Clinton Station Manufacturing Co. v. Hummell.

dwelling-house and lot at High Bridge, in that county, which they seek by this proceeding to subject to the payment of their debt. The title to that property is in the defendant, Harriet Hummell, wife of the judgment debtor. The complainants allege that in 1868, Cornelius Hummell bought this lot for \$250 and paid part, \$50, of the purchase money, in cash, and with his wife, gave a mortgage on the premises to secure the payment of the rest, and that he then built on the property a dwelling-house, for the occupation of himself and family, in which he has resided ever since it was finished. They allege that the property is actually his, though the title is held by his wife, and that the title is so held in order to defeat his creditors. The defendants answered. They allege that the lot was purchased by the wife, and that the \$50 paid on account of the purchase money was her own money, and that she built the house (which they say is of the value of only about \$1200, instead of \$4000, as alleged in the bill, and paid all that was paid for its construction; that of the amount she so paid, she obtained \$800 from one Mary Alpaugh, on a mortgage on the property, and that the work was done by her husband's workmen, (he was a builder and superintended it,) under an agreement between her and him by which she agreed to board his workmen in consideration of receiving from him the amount of their board. The evidence shows very clearly that the lot was purchased and the house built with money which was by law the property of the husband. The \$50, to which reference has been made—paid by her as the first payment on account of the purchase money of the lot, was given to her by her husband for that purpose. It is true they testify that he owed it to her—that it was money he had borrowed of her. Their account of the loan, however, is that three days after they were married—which was six or seven years previous, he borrowed \$15 of her, and afterwards they sold a cow her father had given her and she permitted her husband to take the proceeds of the sale—\$18, and that she also lent him \$19.50 which she had earned by washing and mending for a person. But Andre—

Clinton Station Manufacturing Co. v. Hummell.

Cregor, from whom the purchase was made, swears that she told him in the negotiation, that she expected to borrow the amount of the first payment, this very \$50, from her father, or her brother Edward. Neither she nor her husband pretend that she had any more than the \$50, for he says she expected to get the balance of the purchase money from her brother. Now how was this house paid for? It cost over \$1600, according to the undisputed evidence: the lumber, \$800, the carpenter work, \$300, the mason work, \$300, the slate roof, \$140, the tinning, \$25, and the painting, \$95, in all \$1650. Of this they say \$800 were paid by the money borrowed of Mary Alpaugh on mortgage of the property. The bill for painting was paid by the husband out of money he received from Christopher Hann, for work he had done for the latter in building a house. One of the masons swears that the husband paid him nearly all his bill for work, and the rest of his claim is unpaid. The tinner testifies that the husband paid him his bill for tin work. The roofer, who found the slate and put it on, has not been paid at all. The husband employed all those persons to do the work they did on the house. He is shown to have worked on the house, himself. He says his apprentice framed it under his directions. As to the money which his wife was to have received for boarding the workmen, that was clearly the husband's property. He furnished the table. The avails of a wife's labor, under such circumstances, belong to her husband. *Belford v. Crane*, 1 C. E. Green 265; *Skillman v. Skillman*, 2 Beas. 403; *Cramer v. Reford*, 2 C. E. Green 367; *Quidort's Adm'r v. Pergeaux*, 3 C. E. Green 472. The house probably cost more than the amount above stated—\$1650. Witnesses for the complainants, apparently capable of judging and forming a reliable estimate, place its cost at from \$2000 to \$2500. The husband says he kept no account of its cost. The conclusion appears to be irresistible, that this property was bought for the husband and with his money; that the house was built by him, and as far as it was paid for was paid for with his money, or the money raised by mort-

Haggerty v. McCanna.

gage given by him and his wife on the property. His wife cannot hold the property against his creditors. The complainants' debt will be decreed to be a charge upon the premises, which will, if necessary, be ordered to be sold to pay the encumbrance. The complainants are entitled to costs.

HAGGERTY vs. MCCANNA.

A died seized of real estate, leaving a widow and an infant daughter. B married the widow, and assuming from her having administered on her former husband's estate that she was the owner of the real estate, erected houses thereon, and improved it in various other ways, and also paid off a mortgage of \$300 upon the property. He also, voluntarily assumed the care and support of his step-daughter. Dower had never been assigned to the widow. Upon the death of her mother, the step-daughter brought an action of ejectment against B to obtain possession of the premises. B then filed his bill to restrain the prosecution of that suit, and praying that the value of the improvements and of the land, irrespective of the improvements, might be ascertained, and the defendant required to pay him for the improvements and the amount of the mortgage paid by him, or release the land on receiving the value thereof, over and above the improvements, after deducting therefrom, the mortgage debt, and a proper allowance for her support while living in his family. *Held,*

1. That the mistake being the result of inexcusable negligence, equity will not relieve from its consequences.

2. The defendant being an infant during all the time in which the improvements were being made, no relief can be had on the ground of acquiescence.

3. Though the mother be considered as having been in possession of the premises as guardian of the defendant, and as having made the improvements as such guardian, the complainant is not, therefore, entitled to have from the defendant, the value of the improvements. A guardian will not be allowed the cost or even the value of the buildings erected on the estate of the ward, without authority.

4. Having voluntarily assumed the support of his step-daughter, the complainant is not entitled to compensation for that support. In the absence of an express promise, made by the child after attaining majority, to repay the step-father, no compensation can be recovered by him, at law or in equity, for such support.

Haggerty v. McCanna.

5. The money paid in satisfaction of the mortgage, with lawful interest from the time of payment, declared an equitable lien on the land, and charged thereon.

6. Taxes paid by complainant and the improvements made by him in this case, balance the rents and profits that might be due the defendant.

7. Had defendant been applicant for exercise of equitable power, instead of complainant, assistance might have been extended to her on terms, or refused altogether.

On final hearing on pleadings and proofs.

Mr. James Wilson, for complainant.

Mr. Mercer Beasley, Jr., for defendant.

THE CHANCELLOR.

In 1864, the complainant married Jane McCanna, then the widow of John McCanna, deceased. She had one child, the defendant, the issue of her marriage with McCanna. The defendant was about eleven years old when her mother was married to the complainant. Her father died seized of two vacant lots in Trenton, then of comparatively small value. After his death, his widow built, at the cost of about \$500, a small house on one of the lots and resided in it. After her marriage to the complainant, the latter built another house on the front of the same lot, and a house on the other lot. He improved the lots in various other ways, by grading, flagging the sidewalks, &c. He and his wife dwelt in one of these houses and rented out the other. He paid the taxes and assessments on the property. From the time of his marriage to this time, he has been in possession of it. His wife had dower in it, but it was never assigned. When the buildings and other improvements above referred to, were put on the property, both the complainant and his wife supposed that the land belonged to the latter, and they first learned their mistake when she, being as she supposed *in extremis*, in September, 1871, called in a lawyer to make her will. She died in September, 1872, leaving three children, the defendant and two other daughters, the issue of her marriage with the com-

Haggerty v. McCanna.

plainant, both of whom are still living. When McCanna bought the property, it was subject to a mortgage for \$300, the amount of which was allowed him as so much of the purchase money. The mortgage was subsequently assigned to his brother, who, in 1867, required payment, and the complainant then, with his own money, paid it, sending to the holder of it in Ireland, a draft for the amount then due on it, \$487, and received it in return with the bond it was given to secure. This mortgage the complainant, in the full belief that the property was his wife's, subsequently, when he was about to mortgage the property to secure a loan, caused to be cancelled of record. The defendant lived in the complainant's family from the time of his marriage to her mother up to March, 1871, when she was sent to a school in Newark. The complainant, however, appears not to have supported her at that school. Very soon after the death of the complainant's wife, the defendant instituted an action of ejectment against the complainant, in the Supreme Court, to obtain possession of the premises. The complainant then filed his bill to restrain her from prosecuting that suit, and praying that the value of the improvements and the value of the land irrespective of them, might be ascertained, and the defendant might be required to pay him for his improvements and the amount of the mortgage debt paid by him, or release the land to him on receiving the value thereof, over and above the improvements, after deducting therefrom the mortgage debt above referred to, and a proper allowance for her support while she lived in his family.

This case is one of great hardship. The improvements are proved to be of the present value of more than \$2000. They were all made by the complainant except the small house before mentioned, built by his wife during her widowhood. Against the value of these improvements, and the payments made on account of the property by the complainant, there is no offset except the value of the use and occupation of the lots, which, undoubtedly, is comparatively very insignificant. The result of the suit at law, must be to de-

Haggerty v. McCanna.

prive the complainant of his entire property. He invokes the aid of this court to prevent so flagrant a wrong. He bases his claim to relief on the ground of mistake. But an error which is the result of inexcusable negligence, is not a mistake from the consequences of which equity will grant relief. The complainant's mistake in this case, was in assuming, as he says he did, from the fact that his wife had administered on McCanna's estate, that she was the owner of the lots of land in question. He appears to have made no inquiry whatever on the subject. On the argument it was urged that on the ruling of this court in *McKelway v. Armour*, 2 Stockt. 115, the relief sought might be granted. But the decision in that case was expressly put on the ground of the complainant's mistake as to the location of a vacant lot, plotted out on a map only, a mistake which the court said was one which might occur to the most careful and diligent man, and the fact that the defendant stood by and participated in the mistake, which latter consideration was regarded as a most important feature in the case. In the present case the defendant, during all the time during which the improvements were made, was an infant, and incapable, therefore, of either the participation or the acquiescence which were so essential elements in that case. Besides, the mistake here was one from which the most ordinary care would have guarded the complainant. No relief can be afforded him on the ground of mistake. Nor can he avail himself of the position taken by his counsel on the hearing, that his wife may be considered as having been in possession of the premises as guardian of the defendant, and as having made the improvements as such guardian, and that therefore the complainant is, in equity, entitled to have from the defendant the value of those improvements. A guardian will not be allowed the cost or even the value of the buildings erected on the estate of the ward without authority. *Putnam v. Ritchie*, 6 Paige 390; *Hassard v. Rowe*, 11 Barb. 24; *Green v. Winter*, 1 Johns. Ch. 26; *Bellinger v. Shafer*, 2 Sandf. Ch. 293; *Payne v. Stone*, 7 Sm. & M. 367. The complainant's

Haggerty v. McCanna.

counsel insisted upon the hearing that, under the circumstances the court would, to relieve the complainant, in part at least grant him an allowance for past maintenance of the defendant. That the support which the complainant gave her, was given without expectation of compensation, is manifest from the evidence. He appears to have voluntarily assumed the care and support of his step-daughter. He therefore stood toward her *in loco parentis*. In the absence of an express promise made by the child after attaining majority, to repay the step-father, no compensation can be recovered by him at law or in equity, for such support. *Chitty on Con.*, 11 Am. ed. 213; *Cooper v. Martin*, 4 East 76; *Shark v. Cropsey*, 11 Bar. 224; *Williams v. Hutchinson*, 3 Comst. 312; *Lantz v. Freese*, 19 Penn. 366; *Worthington v. McCraer*, 23 Bear. 81; *Grove v. Price*, 26 Bear. 103; *Schouler on Dom. Rel.* 378.

I do not feel at liberty, even for so conscientious a purpose as to mitigate the unquestionable hardship of the complainant's case, to create a liability where no legal or equitable foundation for it exists. The case in 26 Bearan is in point. There the step-father's estate was chargeable with certain trust money received by him, the property of the step-children. His executor sought to offset it by a claim in favor of the step-father for the maintenance of the children. The master of the rolls, Sir John Romilly, refused to allow it.

I am constrained to refuse the relief the complainant asks on this ground also. The money paid in satisfaction of the mortgage, however, with lawful interest from the time when it was paid by the complainant, should be declared to be an equitable lien on the land, and should be charged thereon accordingly. The taxes, &c., paid by the complainant in respect of the property, and the improvements made by her thereon, are enough to answer any just demand of the defendant for rents and profits. In any account of these rents and profits, between her and the complainant, she would be in equity, entitled to only two-thirds thereof, during the lifetime of her mother, whose dower in the premises was never assigned. The complainant is entitled, also, to his costs

In matter of Rebecca Mickle.

this suit. I shall therefore charge upon the land, the amount paid in satisfaction of the mortgage, with interest from the time when it was paid, and on payment thereof to the complainant, with his costs of this suit, the injunction will be dissolved. This case would present a different aspect as to the relief which the court could afford in the premises, were the defendant, instead of the complainant, an applicant for the exercise of equitable power. In such case, the court might extend its assistance to her on terms, or refuse its aid altogether, according as equity might seem to demand.

IN THE MATTER OF THE APPLICATION OF REBECCA
MICKLE FOR THE SALE OF LANDS.

Lands devised to R. and C. during their natural lives, and after their decease to their children, with proviso that if either of them should die without issue, the survivor should have the entire property during her life, and at her death it should descend to her children, directed to be sold under the "act to authorize the sale of lands limited over to infants, or in contingency, in cases where such sale would be beneficial."

On petition and proofs.

Mr. P. L. Voorhees and *Mr. A. Browning*, for the petitioner.

Mr. J. M. Scovel, contra.

THE CHANCELLOR.

The petitioner, Rebecca Mickle, prays a sale of certain lands and premises situate in the city of Camden, which, by the will of John W. Mickle, deceased, are devised to her and her sister Clara Mickle during their natural lives, and, after their decease, to their children, with proviso that if either of them should die without issue, the survivor shall have the

In matter of Rebecca Mickle.

entire property during her life, and at her death it is to descend to her children. Both the petitioner and her sister Clara have married, and have issue. This application is made under the provisions of the act "to authorize the sale of lands limited over to infants, or in contingency, in cases where such sale would be beneficial." That act provides (*Nix. Dig.*, § 39,) that in all cases where any future or contingent estate in lands is wholly or in part limited over to infants or persons not *in esse*, or in such manner that the vesting or duration of such estate may be contingent, and the interest of the owners of the particular and future estate in such lands, require, and would be promoted by a sale thereof, it shall be lawful for the Chancellor, upon the application of any person owning a vested estate therein, to direct such land to be sold in fee, and for that purpose to inquire into the situation of such lands, and the merits of the application; and if, upon such inquiry, it appears that the situation and present and prospective value of such lands are such that it would be to the interest of any person who might own the same in fee to sell the same, the Chancellor shall direct such sale. Rebecca Mickle, owning a vested estate in these lands, applies to have them sold in fee. An inquiry has been made according to the directions of the act, by a special master of this court, under a reference.

He reports that the interest of the owners of the particular and future estates will be promoted by such sale. The petitioner has produced numerous witnesses, whose testimony is before me. The lands consist of two tracts: one, including certain flats on the Delaware river, contains about two hundred and sixty acres; the other is a marsh, not connected with the named lot, and contains about ten acres. The premises are unimproved, and are liable to be subjected to heavy assessments for city improvements. The receipts from them for the last eight years are, in the aggregate, \$36,288.40, while, on the other hand, the expenses have been \$28,915.61—not taking into account the cost of necessary repairs. In the near future, the burthen of extensive municipal improvements, no

Eaton v. Cook.

contemplation, will be devolved upon the property. It appears to me to be very clear, from the evidence, that it is the interest of the owners of the particular and future estates in those premises, that the land should be sold. Though it may increase in value within a few years, yet it appears from the evidence very doubtful, to say the least of it, whether that increase would be equal to the interest which would be realized on the investment of the price for which it could now be sold. An order for the sale of both tracts will be made. I am satisfied the property can be sold to the best advantage by selling each tract as a whole.

EATON vs. COOK and others.

1. It is not necessary to a trust that there should be any transfer of property, whether the fund be in the possession of the donor or of another. The property may still remain as it was, and the donor may constitute himself as the possessor, trustee of it.

2. If a person, by a written instrument, or by word, directs his debtor to hold the money due, in trust for a third person, and such direction is communicated to the debtor, an effectual trust in favor of the donee is created, especially where, as in this case, the debtor has acted on the direction and consented to the arrangement.

3. In construing a declaration of trust: "I hereby cancel the above bond and give it voluntarily to Mrs. J. C. and her heirs," verbal declarations of the donor, made prior to and contemporaneously with the gift, and relating to it, are competent evidence as to whom she meant to designate by the words "her heirs."

On final hearing on pleadings and proofs.

Mr. E. A. S. Man and *Mr. B. Williamson*, for complainant.

Mr. A. G. Richey, for defendant.

Eaton v. Cook.

THE CHANCELLOR.

The complainant files his bill to establish as against the defendant, Dr. Lewis C. Cook, his step-father, and in favor of himself and the defendants, James A. Eaton, his brother, and Silas P. Cook, his half-brother, a trust as to a sum of money, in the bill alleged to be \$10,000, but which appears in fact to be \$8500. He alleges that this money was placed in the hands of his step-father by the complainant's grandmother, Mary A. Hall, in 1855, in trust for her daughter, Janet Cook, the complainant's mother, then the wife of the defendant, Lewis C. Cook, and her children, to use and apply the interest of it to the support of the family of said Lewis and Janet, and on the death of the latter, to pay over the principal in equal shares to her children. Mrs. Cook died in 1861 or 1862, leaving three children, the complainant, and his brother and half-brother above mentioned. The defendants, Lewis C. Cook and James Eaton, have answered, the former denying, and the latter alleging the existence of the trust. The defendant, Silas P. Cook, has not answered. The evidence taken in the cause consists of the testimony of certain witnesses sworn on behalf of the complainant, and the bond hereinafter mentioned, and a letter from the defendant, Lewis C. Cook, to the complainant's aunt, exhibits for the complainant. The answer of Dr. Cook, while it denies that at the time mentioned in the bill he received \$10,000, or any other sum from Mrs. Hall in the trust or condition alleged in the bill, or on any true states, that in 1852 he married Janet Eaton, then a widow with two children, the complainant and defendant, James A. Eaton, by her then late husband, and that he has had her one child, the defendant, Silas P. Cook; that for 1 years after his marriage with her, her sons, Louis and James being then of tender years, were supported by him, at expense; that Mrs. Hall visited his house after the marriage and manifested an earnest desire for the welfare of his and himself; that on or about the first of June, 1855, he loaned to him and his wife \$10,000, for which they gave

Eaton v. Cook.

her their joint bond, payable in ten years from its date with lawful interest, payable annually; that afterwards, and in November of the same year, Mrs. Hall, at her residence in the city of New York, told him, that she did not wish that he and his wife should be required to repay that money which she had so loaned to them, and producing the bond, she then and there, in his presence, cancelled it by tearing off the seals, and declared that she gave the money secured thereby to her daughter, his wife; and she then, he states, made an 'endorsement,' in writing, on the bond to that effect. The answer further states, that after the cancellation of the bond the money was used by him and his wife as their own, some of it in family expenses, and some in the purchase of real estate, the title to which he took in his own name, and he claims that the money so invested, having been thus used in the lifetime of his wife and incorporated with his own estate became his property. He offers no proof in support of his answer. The transaction set forth in the answer is clearly the same to which the bill refers, although the time when it occurred is erroneously stated in the latter. Dr. Cook is in error as to the amount of the bond. It appears to have been \$8500 instead of \$10,000. The difference is accounted for by Mrs. Hall in her testimony. The loan, she says, was in bank stock, and Dr. Cook sold it and professed to have realized upon it, only \$8500. That he received this money from his mother-in-law, Dr. Cook admits. He admits also that he never repaid it, or any part of it. He denies the trust, and alleges that the money secured by the bond was given by his mother-in-law to his wife. It appears that when Mrs. Hall made the disposition of the debt which is in dispute here, she signed in the presence of a lady, Mrs. Taylor, who was called on as a witness to the transaction, the following statement, called by Dr. Cook an endorsement,) which was written below the bond. "New York, November 9th, 1857. I hereby cancel the above bond and give it voluntarily to Mrs. Janet Cook and her heirs." At the same time she cut off the signatures and seals. She retained the bond, delivering it to

Eaton v. Cook.

Mrs. Albro, another daughter of hers, who kept it until she died, and Mrs. Hall subsequently got it from Mrs. Albro's executors.

The counsel of Dr. Cook insists that there is no competent proof of a trust; that the written statement is no evidence of one, and that, inasmuch as that statement is in writing, no parol testimony can be admitted to prove a trust in regard to the money. It is not necessary to a trust, that there should be any transfer of property, whether the fund be in the possession of the donor or of another; the property may still remain as it was, and the donor may constitute himself as the possessor, trustee of it. If a person, by a written instrument or by word, directs his debtor to hold the money due, in trust for a third person, and such direction is communicated to the debtor, an effectual trust in favor of the donee is created, especially where, as in this case, the debtor has acted on the direction and consented to the arrangement. Here, the fund was in the hands of Dr. Cook. When the bond was canceled the money it was given to secure, was no longer a debt due to Mrs. Hall, but was a trust fund, held, as he claims, in trust only for his wife; as the complainant claims, held in trust for his wife and her children. The language of the declaration written on the bond, is not to be construed as it would be were it a transfer of chattels for value. In such case the words "and her heirs" would have no significance but would be rejected, and Mrs. Cook would be held to have taken the property absolutely. But we are dealing with an acknowledged trust, and in construing a declaration of trust a different rule is to be observed. The directing principle which governs this court in the exercise of its jurisdiction in regard to trusts, is the intention. "Trusts," said Lord Northampton, in *Earl of Northumberland v. Earl of Egremont*, *Eden* 446, "are to be ruled and governed according to the intent of the parties, where such intent is consistent with the rules of law, and the court will, from the general frame of the testament or settlement, collect the intent, contrary to the express words of a particular clause." In ascertaining the

Eaton v. Cook.

donor's intention in this case, we are not confined to her declaration written on the bond. A trust of this property could have been created by parol. That written statement does not exclude parol evidence of the donor's intention. Her verbal declarations made prior to, and contemporaneously with the gift, and relating to it, are also competent evidence of her intention. In *Kilpin v. Kilpin*, 1 *My. & K.* 520, a trust of chattels was proved by the donor's verbal statements as to his intentions, as well as by his written entries. In *Forster v. Hale*, 3 *Ves.* 696, parol proof was admitted and considered in connection with written evidence, in determining whether there was a trust. In *Steere v. Steere*, 5 *Johns. Ch.* 1, where it was sought to establish a trust of land, Chancellor Kent received and took into consideration parol proof, to "explain the obscurity of the case by showing what was the understanding of all the parties concerned." He based the admission of the evidence on the loose and ambiguous nature of the written proof.

In the present case the parol evidence is not offered to vary any declaration or acknowledgment signed by Dr. Cook, but as additional (and even better, because more distinct,) proof of the donor's intention. By it, it is made clear whom she meant to designate by the words "her heirs," and also, what interest she intended that her daughter and her daughter's children respectively, should have in the trust fund. The witness Mrs. Taylor, above mentioned, testifies distinctly, that when Mrs. Hall called her to witness the cancellation of the bond, she said she wished her to see her cancel that bond, giving the interest to Mrs. Cook and the principal to her children. On cross-examination she says, that on that occasion, Mrs. Hall told her she gave the interest to Mrs. Cook and the principal to her children. Dr. Cook was present at the transaction narrated by Mrs. Taylor. He and Mrs. Hall were together in Mrs. Taylor's room, talking together before Mrs. Taylor was called in, and they were there together when the cancellation took place and the declaration was signed, and when the verbal statement of Mrs. Hall as to her

NICHOLS v. NICHOLS.

intention, was made to Mrs. Taylor. She further says, that it was said at that time that the money was to be invested, and the donor and his wife were to have the interest. Mrs. Hall testifies that it was always the understanding that the boys were to have this money; that when her daughter got in the witness told her she was to have the use of it, and it was to go to her children.

From this testimony, which is entirely uncontradicted, it is quite clear that the intention of the donor was that Mrs. Cook should have the interest of the amount of the bond debt for her life, and that after her death, the principal should go to her children.

The complainant and the defendants, James A. Eaton and Silas P. Cook, are each entitled to have from Dr. Cook, one-third of the amount of the bond, with lawful interest thereon from the date of the death of their mother. Dr. Cook denies the trust and that he made any payment to the complainant on account of it. No reference will therefore be necessary.

The complainant is entitled to costs as against Dr. Cook.

NICHOLS vs. NICHOLS.

1. A party to a conclusive divorce is bound by it, and cannot, in another suit for divorce, brought in this state, take advantage of the fraud and illegality of the proceedings upon which such decree was based.

2. The judgment of a court of general jurisdiction in any state in the Union, is equally conclusive upon the parties in all the other states, as in the state in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, 2. If it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of the attorney to appear for him.

3. When a decree of divorce has been acquiesced in for several years, and the plaintiff has again been married, the court will not disturb the decree for the purpose of giving alimony. Such intervention should be based on public policy, but no such reason should suffice where, after

Nichols v. Nichols.

acquiescence of both parties in the decree for four years, an innocent person has been involved by marriage, and the opening of the decree would involve her in distress, and perhaps disgrace.

On bill for divorce, plea, and replication.

Mr. Good and *Mr. N. Perry, Jr.*, for complainant.

Mr. Ransom, for defendant.

THE CHANCELLOR.

The complainant, in July, 1872, filed her bill against the defendant, whom she claims to be her husband, for a divorce *a vinculo*, on the ground of adultery, and for alimony and the custody of their three children. The parties were married in Massachusetts, November 16th, 1852. The bill alleges that the complainant, for the ten years next preceding the filing of the bill, had been, and was, when the bill was filed, a resident of Plainfield, in this state, and that the defendant was also a resident of that place up to on or about the 10th of January, 1868, when he left the residence of the complainant at Plainfield, and went to the city of Brooklyn, and that, at the filing of the bill, he was still at the last named place. The adultery is alleged to have been committed with one Alice S. Paul, in April, 1870, at Brooklyn. The defendant was not served with process, but having received notice of the suit, appeared and pleaded that he and the complainant were divorced from the bonds of marriage in Indiana on the 27th day of June, 1868, in a suit in the Court of Common Pleas of the county of Allen, of that state, wherein the complainant appeared and answered. The complainant replied that the decree of divorce was fraudulently obtained; that the court never acquired jurisdiction over the parties to, or the subject matter of, the proceedings, nor over their marriage relations, and that the parties had been, from 1862 up to, and were, at the time of those proceedings, residents of this state;

Nichols v. Nichols.

that the complainant never appeared in person or by attorney in the Indiana court, and never, knowingly, signed a warrant of attorney as set forth in the plea; that she never knew or heard of the proceedings until after the decree was obtained, and that the proceedings and the decree are fraudulent, illegal, void, and of no effect, and cannot be the ground of a plea in bar to her complaint.

It appears from the evidence, that the parties to this suit lived together as husband and wife in Plainfield, where the defendant was a practising physician, up to January, 1868, when, he having sold out his practice, they broke up house-keeping, and, storing their furniture, went with their children to the residence of his father in Sturbridge, Massachusetts. The complainant did not return to this state until some time in July following. The defendant, after remaining at Sturbridge for about a week, returned to Plainfield, as the complainant says, and as appears otherwise also, to settle up his business. He remained there for about a month, engaged in collecting debts due him, and in packing up his goods, to remove them. He then went to the west, was in Indiana in March, 1868, and claims to have taken up his residence there. From Indiana he appears to have come back to the east, he alleges, with the intention of returning again to Indiana for the purpose of collecting the debts due him here. He left Indiana about the 1st of April, and from that time until about the 1st of July, when he settled in Brooklyn, appears to have had no particular abiding place. He, however, did not return to Plainfield, nor did he again come to this state to reside.

That he left New Jersey intending to change his domicile I have no doubt. There had been trouble between him and his wife, arising from alleged familiarities of a grossly improper, not to say criminal, character on her part, with a man then residing in Plainfield. Naturally, under the circumstances, a change of residence would have been desirable. That he did remove his domicile from this state is quite clear. When the proceedings for divorce were instituted in Indiana

Nichols v. Nichols.

and until their conclusion, he was, if not a resident of that state, a resident of Massachusetts. Neither he nor the complainant resided in New Jersey. Those proceedings are assailed on the ground that the court in Indiana had no jurisdiction over the persons or the subject matter. As to the former, they were both before it. The wife had notice of the suit. The summons had been served on her in Massachusetts, and although such service was technically a nullity, yet it was actual notice. She appeared and answered, by attorney duly appointed. The court had, by statute, jurisdiction over the subject of divorce. It had jurisdiction over the subject matter of the complaint. The statute under which those proceedings were taken, provided that, in addition to the causes of divorce therein specified, a divorce might be granted for any other cause for which the court might deem it proper that a divorce should be granted. The petition laid a proper foundation for the decree. It also appears by the record, that the question of domicil was passed upon, and the petitioner was adjudged to have been at the time of the filing of the petition a *bona fide* resident of Indiana, and to have been such for a year previous thereto. The decree is conclusive in Indiana, and it is so here also. *Cheever v. Wilson*, 9 Wall. 108; *Kinnier v. Kinnier*, 45 N. Y. 535; *Kirriگان v. Kirriگان*, 2 McCarter 147.

In *Shumway v. Stillman*, 6 Wend. 447, the court said: "An examination of the cases results in the establishment of the following proposition: that the judgment of a court of general jurisdiction in any state in the Union, is equally conclusive upon the parties in all the other states, as in the state in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record, that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and 2, if it appear by the record, that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him."

Nichols v. Nichols.

In *Vischer v. Vischer*, 12 Barb. 640, Hand, J., said: "Whatever may be the rule in respect to divorces granted by the courts in other countries, I am inclined to the opinion that a divorce granted by the courts of one of our sister states, after appearance, or if the parties are domiciled there, after personal service, there being no fraud or collusion, would be conclusive here. And it may be doubted, in case of an appearance and litigation on the merits, whether the proof of the domicil of the parties, or the *lex loci contractus*, or the *locus delicti*, would affect the decree." But it is urged, that in this case the proof is that the petitioner in the suit in Indiana, had not, in fact, been a *bona fide* resident of that state for a year previous to filing the petition, and that therefore the proceedings and decree of divorce were and are a fraud upon the complainant, and upon the laws of this state. I deem it unnecessary to express an opinion on the question whether the decree is conclusive on the subject of the domicil of the petitioner, a point on which the courts have differed widely, for if it be not so, and the fraud be admitted, the complainant in this cause was manifestly a party to it, and cannot take advantage of it. Her letters alone, conclusively show that she not only had knowledge of the institution, but also of the pendency and progress of the suit. They show, too, that she, notwithstanding her denial when testifying as a witness in this cause, executed the warrant appointing an attorney to appear for her, and did so, understandingly and with deliberation. There is also other abundant proof of these facts. It is no answer to suggest that she was induced to execute that instrument by influence of her husband, for she not only offers no proof on this score, but unequivocally and persistently denies on oath, that she executed that paper, or any other paper authorizing an appearance for her, or had any notice of the suit. There is, therefore, no room for such a suggestion. But admitting the suggestion, there is no evidence whatever of the husband's influence over her in this matter, though there is evidence warranting the conclusion that there was an agreement between them, arising out of his

Nichols v. Nichols.

determination to repudiate her for the conduct before alluded to, and her desire to escape publicity in the proceeding, and his willingness to spare her as much as possible, that a divorce should be applied for and obtained in Indiana. She lived during all the time of the progress of those proceedings, at her husband's father's house, and was cognizant of the pendency of the suit. During all that time, up to July 1st, 1868, which was a few days after the divorce was decreed, she was supported by her husband there. She selected an attorney from a list furnished her by her husband, and went with her husband's father and her husband to a justice of the peace, in Spencer, Massachusetts, and before him executed and acknowledged the warrant of attorney. Nor will the fact that the divorce was thus obtained, avail her in this suit. The parties to a collusive divorce are bound by it. *Duchess of Kingston's case*, 20 *How. St. Tr.* 355; *Greene v. Greene*, 2 *Gray* 361; *Kirri-gan v. Kirri-gan*, *supra*.

There is still another consideration. I am satisfied from the evidence that the parties to this suit were not residents of this state when the suit in Indiana was commenced, nor at any time during its progress, nor at the time when the decree was made. No fraud on the law of this state, therefore, was committed by those proceedings or that decree.

Further, the complainant returned to New Jersey in July, 1868, immediately after the divorce was granted. The defendant, at about the same time, settled in Brooklyn. In 1870, he was married to the woman with whom, in the bill of complaint in this cause, the adultery is charged to have been committed, and that alleged adultery is the connubial intercourse between them. By her he has a child, the fruit of their marriage. The complainant filed her bill in July, 1872, four years after the decree of divorce was made, and over two years after her husband had contracted the second marriage. No reason or excuse is given or appears, for this delay in applying for relief against the proceedings of which she complains. In *Singer v. Singer*, 41 *Barb.* 139, on a motion to set aside a decree of divorce for collusion, the court

Dillett v. Kemble.

said: "Where the judgment of divorce has been acquiesced in for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application. The ground on which such an order would be made, would be one of public policy, but no such reason should suffice where, after the acquiescence of both the parties in the judgment for three years, an innocent person has been involved by marriage, and the opening of the judgment would involve her in distress and perhaps disgrace. This reason alone would be sufficient to justify me in denying the motion if there were no other reasons for doing so, and leaving the parties to the consequences of their own acts and agreements after the long delay that has taken place." Here is a longer delay, wholly unexplained. The object of this bill is obviously, merely alimony. Public policy does not require the intervention of this court between these parties. It rather forbids.

The plea is proved. The bill will therefore be dismissed without costs.

DILLETT vs. KEMBLE and others.

1. Equity will not relieve a person from the effects of a mistake which is the result of his culpable negligence.

2. Knowledge that a judgment was outstanding upon lands upon which the owner, supposing them to be free from encumbrance, was erecting a building in the sight of the person having such knowledge, and silence on his part while the building was thus being erected, will not estop him from enforcing execution upon that judgment in which he purchased an interest after the building was sufficiently advanced to secure the amount due thereon. Silence would not operate as an estoppel until he obtained an interest in the judgment.

Dillett v. Kemble.

On final hearing on pleadings and proofs.

Mr. F. Voorhees and *Mr. P. L. Voorhees*, for complainant.

Mr. Ewan Merritt, for defendants.

THE CHANCELLOR.

One of the two points made in this cause, and which were argued very elaborately before me, was passed upon by the late Chancellor, as appears by his opinion in *Dillett v. Kemble*, 8 *C. E. Green* 58. He there held that the complainant had no title to relief on the ground of mistake. I fully concur in that opinion. The complainant's mistake was the result of culpable negligence. He took the title to land he had purchased, paid the consideration money, and built upon the property, before he discovered that it was subject to the lien of the judgment, the payment of which the defendants were seeking to enforce against it when the bill was filed. He had, indeed, caused a search to be made for encumbrances, but it did not extend to the records of the Supreme Court, where the judgment in question was recorded. His excuse for the omission is, that he did not know that there was such a court as the Supreme Court, in New Jersey. Ignorance of the general laws of one's own country, is presumed to be gross negligence. Every man in this state will be presumed to know of the existence of its judicial system, of the jurisdiction of its courts, and of the effect and operation of their judgments and decrees upon property. In this case the complainant was aware of the importance of investigating the title, but from want of full knowledge of the subject, and his omission to obtain the information he needed, he failed to learn of the existence of the encumbrance in question. Equity will not assist a man whose condition is attributable to his failure to exercise that diligence which may be fairly expected from a reasonable person. This rule has been applied where the negligence was that of counsel. Where a purchaser was evicted by reason of a defect of title which his counsel had overlooked, it was held

Dillett v. Messmore.

that he had no claim in equity to be repaid the purchase money.

See Wixson v. Trustees of Raleigh, 3 Tex. 233, 235.

The other point made, is that the holders of the judgment, being aware of the fact that the complainant was building a house on the land on which the judgment was a lien, inequitably stood by, keeping silence as to the lien or existence of the judgment, until the complainant had expended a large sum of money in the erection of the building, and then proceeded by execution to enforce their lien upon the premises. The judgment appears to have been recovered by Allen and McLaren against John Scott, the complainant's grantor, January 17th, 1868, for \$576.03, and execution issued thereon the same day to the sheriff of Burlington, by whom it was returned with a levy on other premises than those conveyed to the complainant. The premises so levied on, appear to have been sold under a prior execution on a senior judgment against Scott, and nothing was realized from them on the Allen and McLaren judgment. Scott conveyed to the complainant the lot on which the latter has built his hotel, May 16th, 1871. It was then vacant, and was sold to the complainant for \$50. Scott assured the complainant that it was free from encumbrance. The complainant began to build, May 20th, 1871, and completed the house about the 18th of the following August. The defendant, Messmore, got an assignment of McLaren's interest on the 6th of July of that year. An alias fieri facias de bonis et terris was issued on the judgment, July 20th, 1871, and levied on the property in question on the 7th of August. Messmore testifies that when he first heard of the existence of the Allen and McLaren judgment, he thinks the cellar of the house was dug and the frame up. Dillett says the mason began to wall the cellar on the 24th of May, and it took him about eight or nine days to do it, and that the carpenters commenced on the 6th of June. Messmore says that it was within two weeks after he first learned of the existence of the judgment, that he purchased McLaren's interest in it. The assignment is dated, and appears to have been executed, on the 6th of July. According

Dillett v. Kemble.

His testimony, it was not a great while after the assignment was made, that he informed Allen, who lived and did business in the city of New York, that the building was being erected on the lot. He says it might have been within a week. From this statement, the truth of which I see no reason to doubt, the house had been so far constructed, when Messmore acquired his interest in the judgment, that the improvement had added to the value of the property more than the amount due on the judgment. It is admitted by Messmore, that he knew of the building from about the time when it was commenced, but he says he had no knowledge whatever of the existence of the Allen and McLaren judgment when the complainant began to build. If he had known of it, and if, to go farther, he had contemplated purchasing it, or an interest in it, with a view to getting payment out of the property as improved by the complainant, I cannot see how those facts can operate as an estoppel against him. His conduct may have been the dictate of malevolence. He may have been actuated by a desire for revenge for a real or fancied insult or injury, sustained at the hands of the complainant. But, conceding these things, he was clearly, up to the time he obtained an interest in the judgment, in no situation to be estopped by his silence.

He was, up to that time, certainly under no obligation to inform the complainant of the existence of the judgment. He was perfectly at liberty to buy the judgment, or an interest in it, and there could be no equity between him and the complainant up to the time when he purchased McLaren's interest. He appears to have purchased it for \$50, and he seeks to compel payment of the judgment out of the complainant's property. I would be glad to be able to relieve the complainant in the premises, but I cannot do so consistently with the rules of law or equity.

The injunction will be dissolved and the bill dismissed, but without costs.

De Luze v. Bradbury.

DE LUZE vs. BRADBURY.

The purchaser of land subject to a continuous and apparent easement, takes it subject to the burthen of that easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time such purchaser bought.

On final hearing on pleadings and proofs.

Mr. T. N. McCarter, for complainant.

Mr. J. W. Taylor, for defendant.

THE CHANCELLOR.

The bill in this action is filed by Alfred De Luze, a lunatic, by his guardian, to restrain the defendant, Adra E. Bradbury, from drawing off from a certain well situated on the land of the latter, any water, so as to interfere with, impair, or diminish the supply of water which, prior to, and at the time of, filing the bill, flowed therefrom to the house of the complainant. It prays a decree establishing the right of the complainant to have that water flow from the well referred to, through certain pipes and a tank or reservoir, all of which are also on the defendant's land, to the complainant's house, without diminution. The bill states that, on or about the first of May, 1862, Henry Nason and his wife leased to the complainant the premises now owned by him, situated in the township of Montclair, in the county of Essex, for the term of one year; that the lease, which was by indenture, under seal, contained, among other things, the following covenants on the part of the lessors: "That, during the said term, there shall be a necessary supply of water in the said house, through the water pipes now laid therein, and that they, the said parties of the first part will indemnify the said

De Luze v. Bradbury.

party of the second part against all damage to the said dwelling-house that may be caused by defects in, or by the bursting or leaking of the said water pipes during the said term, provided that, during the winter months, when said house is unoccupied, they be allowed access thereto. And that, in case the party of the second part, his heirs or assigns, shall elect to purchase the said premises for the sum of \$5000, and shall on or before the first day of April, 1863, give written notice of such election to the said parties of the first part, their heirs or assigns, then the said parties of the first part, their heirs or assigns will, on the first day of May, one thousand eight hundred and sixty-three, upon receipt of the said purchase-money, by a good and sufficient deed, with full covenants, convey the said premises to the said party of the second part, his heirs or assigns, in fee simple, free from all encumbrances except a mortgage for three thousand two hundred and fifty dollars, to the trustees under the will of Nathaniel Crane, deceased, which mortgage shall be assumed by the purchaser, in part payment of the purchase money above mentioned, the said deed also to contain mutual covenants, that Hillside avenue shall be continued the same width as on the north side of Mountain road, and upon a continuation of the same course, half upon the premises above demised, and half on the adjoining lands of the parties of the first part." The bill further states, that prior to the execution of the lease, the negotiations therefor were conducted on the part of the complainant by his wife, and that, when she examined the house with a view to hiring it for occupation by the complainant's family, it was shown to her by Nason, who was then the owner of it, and she found it fitted up with a range, a boiler, and all the ordinary appliances for the use of hot and cold water, and with stationary wash trays and stationary wash bowls in all the bed rooms, with hot and cold water running into all of them, and apparently in good order, and that among other inducements held out by Nason to her, to induce her to consent to hire the house for and on behalf of the complainant, Nason assured her that the water with

De Luze v. Bradbury.

which the house was supplied was pure mountain water from a never-failing spring; and the complainant alleges that the fact that the house was so supplied with hot and cold water, and with all the appliances for its convenient use, and that the house, which was new, was constructed for such supply of water, tended greatly to induce him and his wife to decide to make the contract for the house.

The bill further states, that afterwards, on or about the date of the lease above mentioned, the complainant and his family entered into the possession and occupation of the premises and of the house thereon, which was a large and commodious residence, and enjoyed them during the term of the lease, or until the conveyance of the property by Nason to the complainant, and during all that time, and up to the making of that deed, the complainant and his family enjoyed the use of a full supply of hot and cold water in and through the house by means of a boiler, wash-tubs, wash-bowls and other appliances erected in the house for the use of the water there, and that the water was then conducted to the house by means of an iron pipe leading from the house to a small tank or reservoir, which had been erected on other land of Nason and his wife, or one of them, and located on an elevation on the side of the road which runs by the house in a westerly or northwesterly direction, to the top of Mount Prospect, and sufficiently high to furnish head enough to force the water by its own pressure, to the upper rooms of the house; and the tank or reservoir was supplied by earthen or tile pipes, which led from it up the hill and on the side of the same road to the spring or well, from which the water ran through these pipes to the tank, and from there through iron pipes to the house; that the works were constructed by Nason, on his own land or land owned by him and his wife, at the time previous to the execution of the lease, when he and his wife or one of them, owned the premises leased to the complainant, as well as that on which the tank was erected and the pipes laid; that the works were constructed for the sole purpose of affording a lasting supply of water for the house, no other house

De Luze v. Bradbury.

deriving any supply therefrom or having any connection with them; that on or about April 24th, 1863, Nason and his wife, in pursuance and fulfillment of the covenant in the lease, conveyed the property to the complainant in fee simple; that the complainant and his family have occupied the house and premises ever since, and that he is still seized of the premises; that on or about August 31st, 1864, Nason and his wife conveyed to William Graves, a tract of land adjoining that conveyed to the complainant, which tract so conveyed to Graves, was the one on which were located the tank or reservoir, and the well or spring and the pipes which conducted the water from the latter to the former; that all of these works were along the side of the highway and outside of the fence which separated the Graves' lot from the road; that in the summer or fall of 1865, the earthen pipes which conducted the water from the well or spring, to the tank, became obstructed by roots of trees, and otherwise insufficient, broken and defective, so that the complainant's supply of water at his house was diminished, and was in danger of being entirely cut off, as it was also, by the spring or well becoming filled with earth or sand washed into it from the surface, and the complainant, to insure a permanent supply of water to his house, in the fall of 1865, and while Graves continued to own the land conveyed to him by Nason and wife, with the full knowledge of Graves and without objection or remonstrance on his part, employed masons and laborers and took up the earthen pipes between the well and tank, and enlarged the tank and laid it in cement, laid down an iron pipe from the tank to the well and enlarged the well and dug it ten feet deep, and laid all the works in a permanent and substantial manner, so that from that time to the present, the complainant and his family have enjoyed, by means of these works, a full and abundant supply of water through their house at all times; that Graves afterwards, March 28th, 1867, conveyed to William B. Bradbury, part of the land conveyed to him by Nason and wife, including the premises on which the works were erected; that at the time of that conveyance, the tank

De Luze v. Bradbury.

and well were in plain sight, on the side of the road, and that Bradbury, when he took his conveyance, knew that they were on the land and were used for no other purpose than for supplying the complainant's house with water; that in the month of January, 1868, Bradbury died, and by his will devised the land so conveyed to him by Graves, to his wife, the defendant; that she has caused a deep trench to be dug on her land and through the fence which separates it from the highway, to the bottom of the well from which the water is now conducted to the tank, and is about to insert a pipe therein at a point below the level of the pipe which lead therefrom to the tank, to draw the water from the well upon her own land, where she has constructed a reservoir to receive it, the effect of which will be to divert entirely the water from the tank, and deprive the complainant's house of its whole supply of water.

The answer denies that the premises of the complainant or before the time of the conveyance thereof to him by Nason and wife, were supplied with water from the spring or well now on the defendant's premises, and alleges that the defendant has been informed and believes it to be true, that the complainant's premises were then and until the conveyance from Nason and wife to Graves, supplied with water from the spring or well on the north side of the road, on other premises than those owned by the defendant; and that when Nason and his wife conveyed to the complainant his premises, Nason proposed and offered to sell and convey to the complainant, also the right to the use of the water from that source, but the complainant refused to buy it and did not do so, but received a verbal license to use the water until Nason should want it, the complainant alleging as a reason for not purchasing or acquiring the right, that the supply was doubtful; that the complainant, finding a year or two afterwards, that the supply was very much diminished, abandoned the spring and the supply therefrom, and dug a well on his own premises from which he procured a supply of water, but being unable to force the water therefrom, to all parts of his

De Luze v. Bradbury.

house, he obtained, as a matter of mere accommodation, a verbal license or permission from Graves to procure a supply from the spring or well on the defendant's premises, which were then owned by Graves, but the license or permission was only temporary and subject to revocation by Graves or his representatives at any time; that whatever expense was incurred by the complainant was voluntary and at his peril, and with the full, explicit understanding and knowledge, that the supply might be discontinued at any time; that he repeatedly endeavored to purchase from Graves, and afterwards from Bradbury, the defendant's husband, the right to draw water from the spring or well, but unsuccessfully, as Graves and Bradbury deemed the spring or well a very important and invaluable adjunct to the premises, and to be kept perpetually and without diminution of the supply, for the use of their premises, and invariably and peremptorily refused to sell or grant such rights for any period. The answer further alleges that the defendant is informed and believes it to be true, that her husband purchased the premises from Graves with the understanding and on the information as well from the complainant as from Graves and Nason, that the use, by the complainant, of the water from the well on the premises, was not a matter of right nor claimed as such, but was only temporary and by sufferance, and subject to be discontinued and cut off at any moment without notice or compensation. The defendant admits that she has taken the measures in the bill mentioned, to draw the water off from the well or spring for her own purposes, and she alleges that she has revoked the license to the complainant to use the water, and claims that she has a right to do so.

The only question submitted is as to the existence of the easement claimed in the bill of complaint. The evidence is very contradictory. On the one hand, Mrs. De Luze swears that the house, which was a new one, and had never been occupied, had, at the time of the execution of the lease, all the appliances for the use of hot and cold water mentioned in the bill; that Nason represented that the water was from

De Luze v. Bradbury.

a never-failing spring, and came from the mountain, the pipe being laid on the south side of the road in Union street, and so into the cellar, and supplying the house; that there was no danger of the failure of the supply, and that the head of the spring was sufficient for a supply for another story in the house. She says she hesitated to take the house, because there was no other means of supplying water on the place, neither well nor cistern—but that the representations of Nason above mentioned, induced her to do so. She resided there from the beginning of the term under the lease. She says that the complainant, during the term, bought the premises of Nason under the provision of the lease in his behalf; that the water was not, during the first year, as Nason had represented it; that the spring became muddy and the water did not run freely in the house; that Nason, on being told of it, said it only required that the pipes be laid deeper, that they were only surface-laid, and promised to have the matter attended to, and to have the pipes laid deeper; that he had the lower ones laid deeper near the house, from the gate to the reservoir, which was located about midway between Mountain avenue and a road next west of it, sometimes called the Eagle Rock road, on higher ground than the ground on which the house stands; that the reservoir was supplied from a spring about one hundred and fifty-two hundred feet further up the hill; that the spring and reservoir were on the south side of Union street, and that the pipes, spring, and reservoir were all on the edge of the road on the outside of the enclosure. She testifies that, after the complainant purchased the property, he built a new reservoir entirely, in the same place where the old one was; that he laid the pipes deeper, and stoned up the spring, the occasion of this being, that in the spring of the year the mud would wash in and make the supply in the house muddy, and that this work was done in 1863, 1864, and 1865, and was finished in the fall of the last mentioned year. It appears that in 1864 the complainant dug a well on his premises. The reason she gives for this is, that there was no other water

De Luze v. Bradbury.

the place, than the mountain water. She says that, though there was a connection between this well and the house, it was only temporary, and while the improvements above referred to were being made to the reservoir. The complainant, after he bought the property, built a stable on it—(there was none on it when he purchased)—and built a cistern to supply it. Nason alleges that he constructed the reservoir, which appears to have been a tank of about seven feet square, for the purpose of supplying the masons with water for building the house; that it depended entirely for its supply on a spring on his land, on the north side of the road, the water from which was conducted to it by an underground pipe, still there. He says he agreed to keep the tank supplied with water during the term of the lease, even though he had to haul the water to it in carts. He states that during the term the surface water brought mud with it into the pipe, and he then dug a trench and laid tile pipe in it on the south side of the road running up the mountain, as the ground, being wet, indicated that there might be water there; that he found no spring, but laid the pipe from ten to fifteen, and perhaps twenty feet from the tank running up the mountain; that that pipe did not prove sufficient, and the pipe from the north side of the road was still continued in place. He says that just before the termination of the lease, the complainant determined to buy the property, and that he proposed to him to buy a water right, and make further improvements by way of development for water, but the complainant declined; that Nason told him he felt confident that a large supply of water could be obtained, and the complainant declined to have anything to do with it, because he had had so much trouble with mud; that the complainant then told him that he had decided to put down a well, and supply his house from it by means of a force pump, and that Nason thereupon told the complainant that he was welcome to take the tank and pipe without charge until he got his well fixed, Nason reserving the right to take up the pipe whenever he should want to use it. That, he says, was the condition of things when he

De Luze v. Bradbury.

sold the property ; that afterwards the complainant dwelt on his own premises, near his house : that he had dug about thirty feet for water, and found he could not get up from the well ; that he (Nason) continued to let the complainant use the tank and pipe while he (Nason) owned the property ; that the former came to him about the water a little while, complaining that it was so muddy it could not be used, and he still offered to sell the complainant a right on the north side, and to make further development up the mountain, to see if they could not get water, but the complainant still refused, because the water was so bad after a rain ; that, after Nason had sold to Graves, the complainant took up the tile pipe on the south side in repairing, and found it was broken, and that there was no water there, and afterwards came to Nason for advice as to what he should do about water, and asked whether he would not look after it if the complainant should dig further up the mountain in hopes of finding a spring with more water ; that Nason told him that he thought he would find water if he would dig further up the mountain, and deeper, going deep enough to avoid surface water, and that he, Nason, told him if he would get Graves' permission he would superintend the work for him with assurance, without charge, the complainant being unable, on account of his business in New York, to attend to it ; that afterwards the complainant came to him and told him he had got Graves' consent, and thereupon Nason proceeded with the work he had promised to superintend. He says they commenced digging from the terminus of the tile pipe on the south side of the road, and from thence up the mountain that they must have dug over a hundred feet up the mountain above the terminus of the tile pipe ; that they came to more water there ; that they struck a vein among the rocks up there where there was more water ; he thinks it must have been twelve feet under ground, and then the well was dug up and connected with the tank by an iron pipe furnished by the complainant, for whom and at whose expense all this was done. This witness swears there was no well there

De Luze v. Bradbury.

any excavation, nor anything else which served the purpose of a reservoir to collect the water and discharge it through the tile pipe, till after Mr. Graves bought the property; that though before that time he did lay tile pipe up the mountain, on the south side, in the hope of finding water, he was stopped, he thinks, by a rock. He subsequently describes this in a somewhat different way. On his cross-examination he says the tile pipe laid by him on the south side of the road terminated among some stones, part of an old stone fence that had been along the road there and had been thrown into the gully on that side of the road. Mr. Graves testifies, that finding the workmen of the complainant engaged in repairing the tank, and making the improvements above referred to, he directed them to inform the complainant that he objected to it, and desired to see him on the subject; that this led to an interview between them, which appears to have resulted in Mr. Graves threatening to stop the complainant in the work if the latter should insist on any right on the south side of the street. He says that after considerable conversation the complainant said he did not want any trouble in relation to the matter; that he would like to get permission to go on with the improvements and finish them; that Graves told him he was at perfect liberty to go on and improve and use the water until he wanted to make other use of it. Graves says the complainant "wanted to buy it, at least he wanted a price put upon it," and that he, Graves, declined to dispose of it unless he disposed at the same time of the lot adjoining inside of it, between Graves' residence and the road. He says the complainant based his claim on the fact that the tank and pipes were in the highway, to which, he insisted, he had as much right as Graves. He further says that he, Graves, suggested that the complainant had no right to have the tank there, and the latter thought he had such right, because it existed when he bought his property. Graves adds that the complainant did not insist on any other right. He also says, in answer to the question whether the complainant claimed a right to draw from the south side, because of the tile having

De Luze v. Bradbury.

been laid above the tank, "he claimed everything as it existed when he made the purchase." The witness adds that he, himself, did not know there was any tile there, and that that question was not raised at all. It appears from Graves' testimony that the complainant insisted on his right to the water from the north side of the road also, as part of his purchase from Nason.

The evidence of Nason seems to me to be open to the charge of disingenuousness in some respects. For instance, he seems unwilling to give a direct answer to the question whether he did not tell Mrs. De Luze, while the lease was a subject of negotiation, that the house had a full supply of mountain water from a never failing spring. His statement as to the tank is liable to the same criticism. He says it was a box, an old second-hand box which he put in for a tank. He admits, however, that it was in fact a second-hand box tank which had been used for water in a cottage he had bought. His statement that he provided for bringing the water to the house merely for the use of the masons in building, does not seem to be entitled to credit in view of the provision of the lease in respect to water, and the various conveniences he had put in the house, the use of which depended entirely on the supply from the tank, from which the water was conducted to the house, not by tile pipe, or any temporary conduit, but by an iron pipe, by which it was brought into the cellar. There is a discrepancy between his statement that he declined to superintend the work of repairing and improving the works until Graves' consent had been obtained, and the evidence of Graves, that he knew nothing of the work until after it had been commenced. Nason expressly swears that there was nothing at or beyond the end of the tile pipe to collect the water, that is, he denies, and that is the drift of all his testimony on that head, that there was any well or receptacle for the collection of water for the supply of the tank, in whole or in part, on the south side of the road, until one was made, as he supposed with Graves' consent, under his supervision.

De Luze v. Bradbury.

for the complainant, after Nason had sold to Graves. It is an important question in this cause, whether the fact is, on this point, as Nason swears, or whether it is as Mrs. De Luze testifies. It seems not difficult to determine which of these two witnesses is entitled to confidence in this particular, for Mr. Nason is not only not corroborated in his testimony on this subject by any witness, but is contradicted by several entirely disinterested persons. He sold to Graves on or about August 31st, 1864. James Hillary swears that he worked for the complainant, from about May, 1863, for over five years, as gardener, groom, &c.; that when he came there, the house was supplied with water from the same reservoir as at present; that the water was carried from the upper tank to the lower by earthen pipes; that the upper tank was a small, round thing, level with the road, that one would hardly notice whether there was a spring in it; that it was stoned up; that he assisted in rebuilding the tanks; that it was done in 1864, and finished in 1865, as near as he can recollect; that the first work he went at, was taking up the earthen pipe, from the lower tank to the upper one; that he took it out himself; that it connected the one with the other; that they then sank the drain about twelve feet deep at one end, and about four feet at the other, and then there was a two-inch iron pipe put down from the upper reservoir to the lower; that the upper reservoir was taken up, and built new and larger; that it was built of brick and stone, and that while this was being done, Mr. Graves owned the property, now owned by the defendant, on the south side of the street, and was present and saw the work going on, but made no objection to it to the witness' knowledge. James Bacron, who took the contract for painting the complainant's house when it was built, and worked at the job, testifies that there was, when he was so engaged, a small basin on the north side of the road, from which the tank was supplied; that he frequently heard Mr. Nason talk about that water supplying the house, and the witness doubted very much whether there was a sufficient supply from the tank for the house; that he heard

De Luze v. Bradbury.

Mr. Nason frequently say there would be a sufficient supply of water; that the witness told him he thought there would be a better supply if he would bring the water from the other spring, from the premises now owned by the defendant; that Mr. Nason said he did not want to do that, because there was supply enough; that the witness then told him that if he would dig from the tank up to the corner of the road, (that is where the well in question is,) he thought he would find water enough, for that ground was always wet and muddy, at all seasons of the year: that Mr. Nason soon set to work to digging, and soon got a supply of water, but did not dig very deep; that he dug from the tank to the place where the well in question is, and then carried the water from the well to the tank; that there was considerable fall from the well to the tank then, and that this was in 1861. Michael Higgins, a stone mason, testifies that he worked at the improvement and repair of the water works, referred to by Nason as having been done under his supervision at the expense of the complainant; that they took up the old wooden tank and built a brick one, and stoned up the well; that there was a little well there before, and the pipes, (which he thinks were old, earthen pipes,) were laid from the well to the tank; that the complainant sunk the well deeper and stoned it up; that the well was near the bend of the road, on the same side as the tank; that he built the foundation of the complainant's house, and then the tank was supplied from a little basin on the north side of the road, afterwards from the well at the corner. He says he thinks this change was made before Graves' house was built. George Speer, the mason who had charge of the work, and who finished the complainant's house for Nason, testifies that when the complainant bought the house, it was supplied with water by a tank up the side of the hill; that the tank was supplied first when he worked at the house, by a tub on the other side of the street, and afterwards Nason built another tank further up the hill, which supplied the former. He identifies the place of the well as the location of the upper tank. Thomas De Witt

De Luze v. Bradbury.

worked, also, on the repair and improvement of the water works. He says his work was opening the old line to receive the stream; that the water got into the old, wooden tank, on the same line it does now; that the water was conveyed to it in earthen tiles and stone, from the upper tank, on the same side of the road; that he helped dig up the old tile pipe, and that it led from the new reservoir to the upper tank, right along side of the road. He says a man named Smith, rebuilt the upper tank, dug it deeper and stoned it up. These witnesses all testify to the fact that there was a well, reservoir, or tank, a receptacle to gather water for the supply of the lower tank, at the place where the well is at present, before the complainant made the repairs and improvements which Nason superintended for him. Bacron, Hillary, and Speer, all testify that it was there before Nason sold to Graves. Both Bacron and Speer testify that it was there as a means of supply to the tank, when the complainant bought the house. Bacron swears that Nason was concerned as to whether the source on the north side would be sufficient to supply the house, and on Bacron's suggestion, the additional supply from the well on the south side, was obtained. In this connection, it may be added that Mrs. De Luze swears that Nason told her, when she took the house, that the spring was located on the south side of the road. The complainant, being now a lunatic, is incapacitated from testifying. There was no one present at the conversation between him and Mr. Graves. The permanent character of the repairs and improvement done to the works by the complainant, does not indicate that he understood that he was exercising a privilege to be enjoyed merely by sufferance, and held only at the will of Mr. Graves and his representatives. I do not think the evidence is such as to warrant me in holding that the complainant is estopped by this conversation, or his acts immediately subsequent to it, from setting up the claim on which he now insists. A witness named Bigelow, testifies to a conversation between the complainant and Mr. Bradbury, in which the former urged the latter to sell him a spring. The testimony of this witness

 FRAAS v. BARLEMENT.

is deprived of much of its weight and significance, by the fact that he then was, and still is, somewhat deaf, and besides, it seems quite apparent, that the spring to which the conversation had reference, was the one on Bradbury's land, of which Barron spoke when he advised Nason to have recourse to it for a better supply for the complainant's house, then owned by Nason.

The weight of the evidence is, that the house was supplied with water from the lower tank, when the complainant bought, and also when he leased the premises: that the tank was then fed by the spring on the north side of the road, and also by the well on the south side. Nason, when he sold to the complainant, owned the premises subsequently sold to Graves. When he sold to Graves, they were subject to the burthen of the easement claimed by the complainant in this suit, and are so still. The easement was continuous and apparent, and the defendant holds her land subject to it. The complainant is entitled to the relief he seeks. *Seymour v. Lewis*, 2 Beas. 439. The injunction, therefore, will be made perpetual. The complainant is entitled to costs.

 FRAAS and others vs. BARLEMENT and others.

Where the conduct of a party sought to be attached for a violation of an injunction, is, literally, a breach of the injunction, but not so in spirit, and it clearly appears that there was not only no intention to disregard the injunction, but a supposition that his action would receive the approbation of the court, he will not be adjudged guilty of contempt.

On motion to dissolve injunction, and counter motion for an attachment for breach of injunction.

Mr. S. H. Grey, for complainants.

Mr. R. S. Jenkins, for defendants.

Fraas v. Barlement.

THE CHANCELLOR.

In 1855, "Washington Lodge, Number Five, Ancient Order of Good Fellows, Camden, N. J.," a benevolent society, was incorporated under the "act to incorporate benevolent and charitable associations." On the 18th of November, 1873, it had ninety-three members, and a fund of about \$1600, besides other appropriate personal property. On that day, fifty-three members of the society assembled in the lodge room, pursuant to a special notice given by certain of the members, including all the officers, who were desirous of dissolving their connection with the Grand Lodge of the Order, and of joining another order called "The Independent Order of Good Fellows." By a vote of 40 to 13, a resolution was adopted, declaring that the lodge and the members thereof would not recognize the authority of the Grand Lodge of the Ancient Order of Good Fellows, or continue to act under the charter and constitution they had received therefrom. A by-law of the lodge, then and still in force, provided that the lodge should not be dissolved so long as seven members were willing to continue it. The complainants being of those who were opposed to the action indicated by the resolution, and being reasonably apprehensive of a perversion of the trust funds and property of the society, filed their bill on the 23d of December following, for an injunction to restrain the defendants, the officers of the lodge, from the threatened abuse of their trust. An injunction was issued. By it the defendants were enjoined from (among other things,) using, or suffering or permitting to be used, any of the regalia or books of the lodge. It appears by the answer of the defendants, that on the 13th of January, 1874, at a meeting of the lodge duly convened, a resolution to which all the defendants assented, was passed, reconsidering and rescinding the resolution of the 18th of November. It recited that resolution, and that upon consideration, the action thereby resolved upon, was deemed ill-advised, unconstitutional and illegal. At this meeting, the defendants wore their regalia and used the books of the lodge. The injunction had previously been duly

FRAAS v. Barlement.

served on them. Motion is now made for an attachment against them for contempt in violating the injunction by this conduct. The defendants on their part, move for a dissolution of the injunction upon their answer.

First, as to the motion for an attachment. The conduct complained of, though literally a breach of the injunction, was not so in spirit. The defendants appear to have acted under the advice of counsel, in rescinding the obnoxious resolution. Under the regulations of the society, it was necessary to the exercise of the privilege of voting, that the member be clad in his regalia. The defendants, who are all foreigners, understood the advice of their counsel to cover this point. I see no evidence of any intention on their part, to disregard the injunction. On the contrary, they undoubtedly supposed that their action would receive the approbation of the court. I cannot, under the circumstances, adjudge them guilty of contempt.

As to the dissolution of the injunction. The bill charges and the answer admits, that the resolution on the 18th of November, was ineffectual for the purpose for which it was intended; that the lodge could not be dissolved so long as seven members were willing to continue its existence, and that those who favored that resolution, were a minority of the members, forty out of ninety-three, while the majority were opposed to it. The defendants disclaim all intention of prosecuting the design by which that resolution was prompted, and declare their willingness to recognize and obey, and that they do recognize and obey the authority of the Grand Lodge, in all things lawful, and they declare also, their willingness to conform to the rules, usages and ritual of the society, and to its charter and constitution. The effect of the restraint which for the protection of the trust fund and property it was necessary to impose upon the defendants, is, to put a stop to the operations of the society and thus to deprive its members of the participation in its funds, the sick dues and burial allowances, to which they may be entitled. The injunction should now be modified. The interdict which prevents the defend-

Coggill v. Millburn Land Company.

ants from exercising any control over the funds and property, should be removed, and they should be permitted to resume the discharge of their official functions under the charter and constitution.

Both motions are denied, but without costs.

COGGILL vs. THE MILLBURN LAND COMPANY and others.

1. A mortgagor will not be permitted to commit waste upon the mortgaged premises to the extent of rendering them an insufficient security for the mortgaged debt.

2. No authority to commit waste upon mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid.

On motion to dissolve injunction, on bill and answer, and affidavits annexed thereto, respectively.

Mr. Joseph C. Potts, for the motion.

Mr. F. H. Teese, contra.

THE CHANCELLOR.

The bill is filed by a mortgagee to restrain the defendants, the Millburn Land Company, the owners of the equity of redemption, and John S. Reeve, Henry C. Agens, and Nathaniel Bonnell, to whom the company have sold wood standing on the property, from committing waste on certain mortgaged premises in the township of Millburn, in the county of Essex. The complainant's mortgage was given to her by William H. Potts, on or about February 27th, 1873, to secure the payment, (with interest,) of \$100,000 of the purchase money, (\$119,000,) of those premises, on the sale thereof by her to him at that time. The principal was payable in installments—\$25,000 on the 1st of December, 1877, \$30,000 on the 1st of December, 1878, and the balance,

Coggill v. Millburn Land Company.

\$45,000, on the first of December, 1879. The mortgage contained a covenant that in case of default in the payment of any installment of principal or interest, for ninety days, the whole principal remaining unpaid should, at the option of the complainant or her legal representatives, be immediately due and payable. The mortgagor conveyed his interest in the premises, subject to the mortgage, which was computed as part of the consideration of that conveyance, to the Millburn Land Company, by deed of even date with that instrument. The bill alleges that neither the company nor Pott is possessed of sufficient property, exclusive of the mortgaged premises, to pay the mortgage, and that the complainant is therefore obliged to look to the mortgage for payment of the money secured thereby. It further states that the premises are a scanty and slender security for the payment of that money: that they consist of unimproved land with a large amount of valuable trees and timber standing thereon, which cannot be cut down without greatly diminishing the complainant's security, and that the premises being, as she believes, barely sufficient for the payment of the mortgage debt and interest, any waste or destruction of them by removing the trees and timber would occasion the complainant the loss of part of her debt. It further states that the company has sold to the other defendants all the timber and trees growing on the premises, and that at the time of the filing of the bill the latter had begun to cut down the trees, and were thus committing waste, and that they had then already removed from the premises a considerable amount of timber cut therefrom and would, unless restrained, continue the waste. The bill was duly verified. On the filing thereof an injunction was issued, pursuant to its prayer. The company alone answered. The defence set up is that the premises were purchased at a very high price; that the land is of a poor quality for farming purposes and has not been under cultivation for many years, on account of its sterile character; that a portion of it is overgrown with wood, and a much larger part is covered with bushes and underbrush, presenting an unsightly appear-

Coggill v. Millburn Land Company.

ance and greatly interfering with passage on foot or otherwise in and across it; that the true value of the land consists in its high situation and its undulating surface, the view it commands, and its proximity to New York, and to facilities for travel to that city; that, estimating the land, for these reasons, to be valuable for villa sites, the company purchased it, nominally from Potts, but really from the complainant, for what they regard as the large price of \$119,000, and paid \$19,000 in cash on account of it on the delivery of the deed, securing the balance by the mortgage.

The company "aver and so charge the truth to be," that the complainant well knew, that neither the company nor Potts purchased the property because of the wood on it, or for farming purposes, but solely for the purpose of laying out roads through it, removing the underbrush, cutting off the wood wherever it interfered with the making of roads or with the outlook or prospect, or in any wise detracted from the proper improvement of the land for villa sites, with lawns and customary improvements; that, in the prosecution of the purposes for which they purchased the land, they have projected roads and avenues upon a portion of the property, and are further engaged in making plans for such improvements; that the peculiarity of the land, its beautiful rolling character, requires much skill in the work, and the company have found it necessary to remove the underbrush, and so much of the woods as interferes with the outlook and prevents the real beauty of the place from being seen and appreciated; that they are doing this work preparatory to bringing the property in whole or in part into the market, during this spring and the next summer; that the timber on the land is not of heavy growth or of great size or value; that about half of it is only fit for fire-wood, consisting of oak, birch, gum, maple and pine; that there are some chestnut trees from seven to twelve inches in diameter, which are the trees of the greatest value, being fit for rails, posts, and ties, and that the whole value of these does not exceed \$1000; that for the purpose of clearing the grounds so as to prepare them for the sale the

Coggill v. Millburn Land Company.

company contemplate, they have contracted with the other defendants to cut off such of the wood and underbrush as is necessary for that object ; that the contract does not embrace all the timber and trees, but expressly reserves such trees, large or small, as have good tops, for shade trees. The company by their answer further say, that by preserving the trees suitable for shade and ornament, and removing all others, with the underbrush, that interfere with the laying out of roads and avenues, proper for the due development of the property, and by removing all impediments to getting the knolls into grass for lawns, and by clearing away the obstructions to the prospect from the land, the company are greatly enhancing the value of the property and not committing any waste thereon, but are, in fact, applying the land to the uses, and solely to the uses, contemplated by both them and the complainant when the company became the purchasers of the property. By the contract, a copy of which is annexed to the answer, the company sold to the other defendants for \$1650, to be paid to the former, all the wood standing on the property, excepting such trees, large and small, as have good tops, for shade trees, such trees to be identified by being marked with white paint before the cutting begins. The allegations of the bill, as to the want of pecuniary responsibility of William H. Potts and the company, are not denied. From the affidavits appended to the answer, it appears that the land has no value for agricultural purposes, and that it is a scant security for the money secured by the mortgage. The mortgagor in possession of mortgaged premises, though he may exercise all acts of ownership, even to the extent of committing waste which does not impair the security, will nevertheless, even though the debt be not yet due, be restrained from such unauthorized acts as depreciate the value of the premises and render the security insufficient. The motion to dissolve the injunction in this case, is based on what may be characterized as a claim of license by implication, a claim of implied authority to adapt the premises to the purposes for which they were purchased. Both parties agree that the land in its

Coggill v. Millburn Land Company.

present condition, is by no means a sufficient security for the mortgage debt. It is not claimed that the complainant has ever expressly authorized the company to cut down the trees, but the latter insist that inasmuch as the complainant was not only cognizant of the purposes for which the premises were purchased by them, but sold the property for those purposes, at what they regard as an exorbitant price, it is inequitable to restrain them from adapting the land to the objects contemplated by both parties in the purchase and sale. The evidence on this head is very unsatisfactory. It consists rather of the statement of the view of the company in making the purchase (which they say, though nominally made by William H. Potts, was in fact, made by them through him,) and of deductions to be drawn from the character of the land and the price paid for it, and the objects of the company, (which appear to have been to buy and dispose of this property,) than of proof of license. The evidence consists of the affidavit of William H. Potts, who swears that he negotiated the purchase, that the complainant was represented by Henry M. Coggill, and that in the conversation with the latter, it was distinctly understood that the object of the purchasers was to suitably prepare the lands for villa sites, and to bring them into market and sell them as such; and of the affidavit of Benjamin C. Potts, to the effect that by the request of Henry M. Coggill, who, he says, was acting as agent for the complainant, he called the attention of William H. Potts to the property, with a view to the purchase of it by the latter; that on behalf of Henry M. Coggill, he represented the value of the land to consist mainly in its rolling character, suitable for building sites for cottages and villas, and peculiarly adapted to landscape gardening and improvements of like character, and in its proximity to New York, by means of the Morris and Essex railroad running through it, and also by means of the West Line railroad, when it should be completed, and that Henry M. Coggill well knew it to be the purpose of the company to improve the lands, and sell them in small lots

Coggill v. Millburn Land Company.

for villa sites, at the time he offered them for sale to the deponent. Apart from the fact that the agency of Henry M. Coggill, to contract for or bind the complainant, is not established, there is in all this, no evidence of any license. No authority to commit waste upon the premises, will be implied from the object for which the property was purchased by the company, nor from the price agreed to be paid. The case of *Brick v. Getsinger*, 1 *Halst. Ch.* 391, is in some respects in point. There the mortgaged premises were glass works and outlying land, about three thousand acres, mainly woodland, bought for use in connection with the works to supply them with fuel. About three hundred acres of the wood and timber land had been over-run with fire, which greatly injured and destroyed the growing wood, and the defendants, when enjoined, were engaged in cutting down the wood. They had cut the wood off about twenty-four acres and were using it for the ordinary purposes of the glass-works and were not, as they insisted, committing any waste, the burnt wood being unfit for market and for any other purpose than that to which they were applying it. And they alleged that if it had been left standing till a second summer, it would have been worthless for any purpose. The defendants further stated, that it was of the greatest importance to the property and its owners, with reference to the rest of the wood, that this wood should be cut without delay, and that at the time the mortgage was given, the premises were used for the purposes of a glass-factory; that the glass-works were then on the property, and were in operation when the mortgage was made, and had been in operation before that time, and that the mortgage was taken with the express understanding and knowledge that the mortgaged premises were then used and would continue to be used for making glass. They disclaimed any desire or intention to injure the complainant's security, but professed to be desirous of prosecuting their legitimate business in the ordinary way, and offered, rather than suffer the loss and inconvenience that must result to them from the continuance of the injunction, to give, under the direc

McDowell's Executors v. Fisher.

tion of the court, undoubted security for the payment of such sum, as on a fair and proper adjustment, might appear to be due on the complainant's mortgage. In disposing of the motion to dissolve the injunction, the Chancellor said: "If a large proportion in value of pine woodland mortgaged, be burnt over, and it be proper to save the wood, and for the benefit of the land, that the burnt wood be cut off, the lands themselves being worth but little without wood on them, it would be right that the wood so burned and cut should be applied toward the mortgage," and he deemed it just that the court should avail itself, as terms on which the injunction should be dissolved, of the defendant's offer of security, so far as to direct that security be given by them for an amount equal to the value of the burned wood they proposed to cut. In the present case the company have sold the wood and timber for the sum of \$1650, (which may be much less than its real value,) payable to them, and which, for aught that appears to the contrary, they intend to apply to their own use. This they ought not to be permitted to do. On the case as made by the pleadings and affidavits, I am not willing to grant the motion to dissolve. There is an additional reason for refusal. It appears that since the issuing of the injunction the complainant has filed her bill in this court to foreclose her mortgage, alleging that interest is in arrear, and that default having continued for the time in that behalf fixed in the mortgage, she has exercised the option given her in that instrument, and that the whole of the principal has thus become due.

The motion is denied, with costs.

MCDOWELL'S EXECUTORS vs. FISHER and wife.

Bill to foreclose a mortgage given as security for money that might be advanced, dismissed; no money having been advanced under the arrangement from which it originated.

McDowell's Executors v. Fisher.

On final hearing on pleadings and proofs.

Mr. S. M. Schanck, for complainants.

Mr. James Wilson, for defendants.

THE CHANCELLOR.

This is a suit to foreclose a mortgage given by the defendants to George McDowell, dated May 22d, 1868, on land Middlesex, to secure the payment (according to its terms) \$3000, on or before the 1st of April, 1869, with interest.

McDowell died in 1872. The complainants, his executors, filed the bill in 1873, alleging that the mortgage was given to secure an indebtedness of \$3000 due from Fisher McDowell when the mortgage was executed. The answer which, according to the requirement of the bill in that respect is under oath, states that the mortgage was made merely security for advances of money which Fisher and McDowell contemplated that the latter, who was Fisher's father-in-law, might thereafter make to him, should it prove to be necessary to aid him in extricating himself from certain pecuniary difficulties in which he was then involved, through making and endorsing notes for his brother-in-law's accommodation. The proof is clear that such was the real character of the instrument, and that no money was ever advanced upon it under the arrangement from which it originated. The testator ought to have given it up to be canceled. Only a few months before his death, he bade the person who drew his will bear it in mind that the mortgage had been given merely to secure advances which had not been made, and in the conversation he spoke about having it canceled. The executors do not appear to have been cognizant of the circumstances under which the mortgage was made, and their action in filing the bill seems to have been entirely *bona fide*.

The bill must be dismissed, with costs, to be paid out of the estate.

Grode v. Van Valen.

GRODE vs. VAN VALEN.

1. Land charged with the payment of legacies and interest thereon, when the testator clearly intended that the charge should be a continuing and subsisting security for the payment thereof, cannot be relieved from such charge by the payment by the devisee of the full amount of the legacies, to the executors.

2. The lien of a legacy charged on land, cannot be divested, except by an actual payment or release, or by a decree in a suit in which each legatee, or his personal representative, is a party.

On final hearing on bill and answer.

Messrs. L. and A. Zabriskie, for complainant.

Mr. Ackerson, for defendant.

THE CHANCELLOR.

The bill is filed to compel specific performance of a contract for the purchase, by the defendant from the complainant, of land in Bergen county. The complainant is the owner of the premises under a deed from George Berry to him. George Berry derived his title under the will of his father, John P. Berry, who, according to the statement of the bill, after devising all his lands to George, bequeathed to another son, Philip, \$200, to be paid within two years after the death of the testator's wife, and gave to each of his four daughters the interest for life of \$400, (to commence within two years from the death of his wife, and to be paid annually,) the principal sum to be paid to her legal representatives on her death. He then charged the land with the payment of those legacies and interest, and appointed George, and Michael Van Winkle his executors. The testator's widow died on the 5th of August, 1860. On or about the 10th of October, 1863, George, in order to relieve his land from the charge, paid to the executor the full amount of the several legacies. April

Grode v. Van Valen.

1st, 1868, he sold and conveyed in fee part of the devise premises to the complainant, who, about five years afterward, agreed to sell part of it, free from all encumbrance, to the defendant, who, on his part, agreed to purchase it.

The answer admits all the material statements of the bill and alleges that the defendant refuses to fulfill his contract merely from apprehension that the legacies may still be charge on the land. The only question for consideration is whether the legacies have been paid or not. The complainant insists that the payment to the executors discharged the land absolutely and forever, inasmuch as, by the settled rule, land so charged, when once it has borne its burden, shall not be again subjected to it. But the question here is, whether the land has indeed borne the burden. That the testator did not intend that the land should be thus discharged, is evident. No trust is imposed upon the executors, nor any direction given to them, in reference to these legacies. It seems clear too, that the testator intended that the charge of the legacies to his daughters and their legal representatives, should be a continuing and subsisting security for the payment thereof for he expressly charges the land not only with the payment of the legacies, but with the interest thereon. He, of course contemplated the possibility, and perhaps probability, that the lives of his daughters would last for many years after the death of his wife. It would, I am satisfied, defeat his intention, to hold that the principal, with the accrued interest, of the legacies to the daughters and their legal representatives might, at any time after the death of his wife, be paid over to his executors in discharge of the land, and thus release the security he had by his will provided for the payment of those legacies. It does not appear, nor is it material under the view I take of the subject, how the money was paid to the executors; whether the liability of George Berry's co-executor to the legatees was secured, or whether George Berry alone, merely in some way acknowledged his responsibility for the legacies in discharge of the lien. The transaction whatever it was, was, so far as the case shows, between his

Grode r. Van Valen.

and his co-executors alone. It does not appear that any of the legatees were consulted. It would, of course, be impossible to consult all who might be in interest, for, until the death of the daughters, it cannot be known who will be their legal representatives.

The transaction in respect to the payment to the executors seems liable to the same objection as the transaction of a similar character, which was under consideration in *Terhune v. Colton*, 2 Stockt. 21, where it was held that a devisee of land charged with the payment of a legacy, and who was also the executor, could not discharge the land by payment of the legacy to himself as executor. That was not regarded as payment. The lien of a legacy charged on land cannot be divested, except by an actual payment or release, or by a decree in a suit in which each legatee, or his or her personal representative, is a party. *Jenkins v. Fryer*, 4 Paige 47, 50; *Schanck v. Arrowsmith*, 1 Stockt. 314.

In *Terhune v. Colton*, the court said: "The will directed that the legacy should be invested and the interest appropriated for the benefit of the legatees; and it secured the payment of the legacy by making it a lien upon the land. Could John C. Schanck (the executor) discharge the land by simply charging the legacy to himself as executor? If he could, the land was no security for the legacy, and the legatees had nothing better than the mere personal security of the executor. The will makes the legacy a lien upon the land until it is actually paid." As to all these legacies, the rule forbids the discharge of the lien on the land by payment to the executors, except pursuant to authority of the legatees. It does not appear that any of them directed or consented to such payment. Of course, as to the legacies to the legal representatives of the daughters, no consent or direction could be given. The general rule on the subject is stated by Lord Lyndhurst, in *Johnson v. Kennett*, 5 M. & K. 624, 630. He there said: "The general rule, as to which there is no dispute, is this: Where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the

Grode v. Van Valen.

purchase money. Where debts are charged generally, or where debts and legacies are charged generally, the purchaser of the real estate are not bound to see to the application of the purchase money."

In *Horn v. Horn*, 2 S. & S. 448, where a trader devised his estates, subject to the payment of legacies, it was contended, that as the real estate of a trader was, by 47 Geo. 3, 74, (repealed and re-enacted by 1 Will. 4, c. 47,) subject to debts generally, the purchaser was discharged from the obligation of seeing that his money was applied in payment of the legacies, as he would have been if the estate had been charged by the testator with the payment of his debts. Sir J. Leach, V. C., however, held that the statute made no difference in this respect. The principle of this decision applies to 3 & 4 Will. 4, c. 104, which make the real estate of a person who dies after August 29th, 1833, liable to simple contract debts. *Ball v. Harris*, 4 My. & C. 264.

In *Gardner v. Gardner*, 3 Mason 178, 218, Story, J., said "The settled distinction is, that if a trust is created for specific or scheduled debts, the purchaser is bound to see to the application of the purchase money." To the same effect see *Perry on Trusts*, § 796. The writer of that treatise says "Where the trust is to pay, from the proceeds of a sale, a particular debt, or scheduled debts only, or to pay certain legacies named, the purchaser must see that it finds its way into the hands of those to whom it belongs. In such case there is no trust that requires time or discretion. The purchase money is simply to be distributed to certain known persons, in sums easily ascertained, and there is no reason to presume that the settler intended that the general rule should not apply." Says Sugden, (*Treatise of the Law of Vendors and Purchasers*, 14th [8th Am.] ed. 358 :) "If an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, the purchaser cannot safely complete his purchase, although the money is invested in the funds as a security for the payment of the legacy to the infant when he shall become of age."

Grode v. Van Valen.

for in the event the fund should turn out deficient for the payment of the infant's legacy, he might still have recourse to the estate for the deficiency. And it would seem that even a court of equity cannot, in a case of this nature, bind the right of an infant." And such is still the rule, unless the trustees are expressly or impliedly authorized to sell, notwithstanding the act of 22 & 23 Vict., c. 35, s. 23, which enacts that the *bona fide* payment to, and the receipt of any person to whom any purchase or mortgage money shall be payable, upon any express or implied trust, shall effectually discharge the person paying the same, from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. And where an estate is devised, subject to existing charges, the purchaser must still, notwithstanding the statute just referred to, see the charges duly paid. See *Sheppard v. Wilson*, 4 Hare 392. Said the court, in *Elliott v. Merryman, Barnardiston* 78, 82: "Where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund."

In *Page v. Adam*. 4 Beav. 269, Lord Langdale, M. R., remarks, that "when an annuity is charged on land, and there is no devise for the payment of debts, and no general charge of debts, it must be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity."

I am of opinion that the payment to the executor did not discharge the land in question from the lien of the legacies. By the contract between the parties, the complainant covenants with the defendant to convey to him the land in question, free from encumbrance. The bill must therefore be dismissed.

Hewitt and Ward v. Montclair Railway Co.

HEWITT AND WARD, TRUSTEES, vs. THE MONTCLAIR
RAILWAY COMPANY and others.

HEWITT vs. THE SAME.

1. When a foreclosure suit has proceeded to decree *pro confesso* and order of reference, and the mortgaged premises are then sold, though the purchaser will be admitted as a party defendant, he will not be permitted to answer. He may be present at the taking of the account and avail himself of all the defences which the mortgagor could, after the decree *pro confesso* against him.

2. But when the suit has proceeded to final decree, though the purchaser may be admitted as a defendant, he cannot contest the complainant's claim.

In each of these cases an order to show cause was granted, under circumstances which appear in the opinion of the Chancellor.

Mr. John Linn, for petitioner.



Mr. Cortlandt Parker, for complainants.

THE CHANCELLOR.

These are suits for the foreclosure and sale of mortgaged premises, the Montclair Railway, its franchises, &c., one on the first, and the other on the second mortgage. The petitioner, William A. Guest, purchased the premises, subject to all prior liens and encumbrances, at the sale made under the order of this court, by trustees appointed in proceedings instituted against the company, under the act "to prevent fraud by incorporated companies." The sale took place after these suits were commenced. In the suit on the second mortgage, final decree had been entered and execution issued thereon, the mortgaged premises advertised for sale thereunder, the petitioner purchased the property. The suit on the

Hewitt and Ward v. Montclair Railway Co.

the mortgage had proceeded to interlocutory decree *pro confesso*, with the usual order of reference in such cases. The petitioner asks to be admitted as a defendant to both suits, to end that he may have an opportunity of contesting the complainant's claims therein. His prayer must be denied as to the suit on the second mortgage. By the final decree in that suit, the railway company and all persons claiming and claiming under them, were foreclosed of all equity of redemption and claim in and to the mortgaged premises, or so much thereof as should be sold under the decree. The petitioner is bound by that decree.

In the suit on the first mortgage he will be admitted as a party defendant. He is bound, however, by all the proceedings in that suit up to the time when he acquired his title; he will, therefore, not be permitted to answer. He may be present at the taking of the account and may avail himself of all defences of which the company could avail themselves, or an interlocutory decree *pro confesso* against them and order of reference.

By the fourth section of the act of March 17th, 1870, (*Amph. L.*, p. 41,) it is provided that where, after the commencement of a suit in this court, any person shall acquire an interest in the subject matter of the suit, such as would have been required that he should have been made a party if acquired before the commencement of the suit, it shall not be necessary to file a supplemental bill to make such person a party, but he may be made a party on petition; he shall be bound, however, by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by his admission, except for such time as it may seem to the Chancellor absolutely necessary for the evidence regarding his claim. The sixth section provides that in such case any person may be made a party, either before or after final or interlocutory decree, but such decree shall not be opened or set aside thereby. The order to show cause granted on the petition in the suit on the second mortgage, is discharged with costs. The subsequent

SIEE v. WIGHTMAN.

order restraining the master, so when the execution in the case was issued, from paying to the complainants the money decreed to be due them therein, is also discharged. The prayer of the petition in the other suit is granted, so far as admit the petitioner as a defendant, but without leave answer.

SIEE vs. WIGHTMAN and others.

1. A mortgage of interest upon a mortgage, without claim of forfeit after the expiration of the time when, by its terms, the principal becomes due, accompanied by an acknowledgment of the receipt as of the day on which it fell due, and the receipt of interest on the mortgage so running, without any claim of forfeiture—held, a waiver of the forfeit.

2. The holder of that mortgage was third mortgage, and a bill had been filed by the second mortgagee to foreclose his mortgage, and a final decree had been entered in favor of the first, second, and third mortgagees, ordering the equity of redemption and permitting the suit to proceed to close and execution, expecting to be able to pay off the first and second mortgages before sale. He has paid them off and now asks that the decree be stayed except as to the assets of the holder of the third mortgage which is due for due. Execution stayed on the payment of costs interest.

On petition to stay execution for sale of mortgaged premises.

Messrs. Stone and Jackson, for petitioners.

Mr. A. W. Bell, contra.

THE CHANCELLOR.

The complainant filed his bill for foreclosure and sale of certain premises to satisfy his mortgage, which was the second one on the property. He made the respective holders of the first and third mortgages parties defendant. A final decree

Sire v. Wightman.

was entered in favor of the first, second, and third mortgagees for their respective mortgage debts, with interest and costs, and an execution was issued on the 23d of January, 1874, accordingly. Wightman, the owner of the equity of redemption, having paid off the first and second mortgages, filed his petition praying that the execution may be stayed, except so far as the costs of the holder of the third mortgage are concerned. He insists that the principal of that mortgage is not due, and will not be until 1878, and he claims that there are no arrears of interest. Owens, the holder of that mortgage, on the other hand, insists that in 1871 the principal became due by reason of a default for more than ten days, in the payment of the interest, which became due on the 24th of June in that year. The mortgage contained a provision that if any interest should remain due and unpaid for ten days, the principal should thereupon become due. It appears, however, that he received that interest in July or August of that year, from Wightman, who, about that time, became the owner of the property, and that the receipt for it was, by Owens' direction, dated as of the day on which the interest became due. Every payment which has accrued since then has been promptly met, and all of them received up to the one which became due after the bill was filed, and that, though duly tendered, was refused, on the ground that the principal had become due, by the default in the payment of interest due in June, 1871. The evidence is, that neither when that interest was paid, nor at any time since, up to the commencement of this suit, was any claim of forfeiture made by Owens. He indeed said, when he received that interest, that he might want the principal, or some part of it, in the ensuing spring, but it does not appear that he made any claim that the principal was due, or made any reference to the clause under which the forfeiture is claimed, or referred to the effect of the default, which had taken place. He did not ask for the principal or any part of it, until December, 1873. Wightman was not aware of the existence of the clause until after he paid the interest due to June, 1871.

 Bell v. Gilmore.

The mortgage was made by a former owner of the property. Under the circumstances, Owens ought not to be permitted to compel, by means of the decree and execution, the payment of the principal of his mortgage. He should have his interest and costs, and on the payment thereof the execution should be stayed. His acceptance of the interest, which was due in June, 1871, accompanied as it was by his deliberate acknowledgment of the receipt as of the very day on which it had fallen due, was a waiver of the forfeiture to which he had become entitled. To this is superadded his acceptance of the interest from time to time as it became due, for two years thereafter, up to the commencement of the suit. *Amott v. Holden*, 18 Q. B. 593.

Wightman permitted the foreclosure suit to proceed to decree and execution, in the expectation of being able to raise the money to pay off the first and second mortgages before sale. His admission to defend himself against the third mortgage has done no injury to the holder of that encumbrance, nor does it preclude him from the relief to which he would otherwise be entitled.

BELL vs. GILMORE and others.

1. The sheriff's return "served" upon the subpoena, is presumptive proof of the service of the notice required by the 38th rule.

2. A personal decree for deficiency of proceeds to pay the mortgage debt does not become a lien upon the real property of the person against whom it is taken, until after the sale, and in case a deficiency is found to exist. Hence, a motion to vacate a personal decree for deficiency, when only the interest of the mortgage was due at the date of the decree, but the principal did not become due till two months afterward, was refused, it appearing that the sale did not take place until after the principal became due.

On rule to show cause. Motion to vacate personal decree for deficiency against Charles H. Ingalls.

Bell v. Gilmore.

Mr. John W. Taylor, for the motion.

Mr. A. W. Bell, contra.

THE CHANCELLOR.

The final decree in this suit, dated October 1st, 1873, contained a personal decree against the mortgagor, for any deficiency which might exist after the application of the proceeds of the sale of the mortgaged premises, to the payment of the money secured by the mortgage. It appears that at the date of the decree, there was due on the mortgage, only the interest—\$568.75. The principal would not become due until the 13th day of December, following. The mortgagor moves to set aside the decree for deficiency, on two grounds: First, that no notice was served according to the 38th rule of this court, which provides that in foreclosure suits no decree shall be made for the payment of the deficiency of the proceeds of sale, to satisfy the mortgage debt, by any defendant legally or equitably liable therefor, unless such decree be specifically prayed in the bill, and a ticket or notice, stating that such relief is sought against him, be served on such defendant with the subpoena, or in case of absent defendants, served with the order to appear, or if the order be advertised, mailed with a copy of such order, prepaid and directed to such defendant, at the post office nearest his residence, or at which he usually received his letters, or be served or published in such manner as the Chancellor shall direct; and second, that at the date of the decree the principal was not due.

As to the first of these objections: The mortgagor, at the commencement of the suit and ever since, has been a resident of this state. He was served with subpoena to answer. Attached to that suit is a notice, in accordance with the rule above referred to. The bill prays for a decree for deficiency against him. He does not say that the notice was not served upon him, but insists that it does not appear that it was served upon him; that is, he insists that the sheriff's return "served," upon the subpoena, is not the evidence of service of the notice which

Bell v. Gilmore.

should be required under the rule. The rule in question is silent as to the mode of proof of service. The act on which it is based (*Nix. Dig.* 119,) makes no provision for notice. Like the tenth section of the act respecting the Court of Chancery, (*Nix. Dig.* 107,) which provides for the service of a ticket in foreclosure suits, on every defendant other than the mortgagor, his heirs, executors, administrators, or assigns, the rule directs that the ticket be served with the subpoena, and that the defendant be found to be served therewith, but it does not, as that section does, direct that it be served by the officer serving the subpoena. Under the section of the chancery act just referred to, the practice has been uniform in regard to proof of service of the ticket. The sheriff's return "served" has been taken as presumptive proof of the service of the ticket. Such, too, has been the practice for many years under the rule under consideration. I see no good reason for adopting a different practice. But in addition to the fact that the mortgagor does not deny that the notice was served on him, it appears that on the 8th of October, a very few days after the day for appearance named in the writ, he caused his appearance to be entered in the suit.

The second objection is based on the ground, that the decree when entered, became a lien upon all the real property of the mortgagor. This is an error. Although by the supplement to the act respecting the Court of Chancery, (*Nix. Dig.* 1 § 92,) it is enacted that all decrees and orders of this court whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation, and effect of a judgment at law in the Supreme Court, from the time of actual entry of such decree, yet this decree was not for a specific sum, but merely for the deficiency, if any, which should, on sale of the premises, be found to exist. It was merely a contingent decree, and could not be a lien until after the sale of the mortgaged premises should have taken place. *De Agreda v. Mantel*, 1 *Ab. Pr. R.* 130; *Quinn v. Thornton*, 8 *How. Pr. R.* 66; *Chapin v. Broder*, 1 *Cal.* 403; *Englund v. Lewis*, 25 *Cal.* 337. As was said

Bell v. Gilmore.

in *Chapin v. Broder*: "A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered by it is ascertained and fixed, no effect can be given to it as a lien. In the present case the provisions in question were of this character, and no general lien was acquired by the docketing of the judgment. There was no personal judgment for this amount, nor was there anything in the nature of a personal judgment, beyond the mere direction for the issuance of the execution in the event of the insufficiency of the mortgaged property to pay the debt. The whole matter was contingent, indefinite, and uncertain, and so long as this continued to be the case, no effect whatever could be given to it." It therefore becomes important to inquire when this provision in the decree in this case began to have the force, operation, and effect of a judgment. That was, at the earliest, when the sale took place. The execution for the sale of the mortgaged premises, was issued on the 11th of October, 1873. The notice required by law, would not have admitted of an earlier day of sale than the 11th of December. The principal became due on the 13th of that month. It was not insisted, nor even suggested, on the argument, that the sale had taken place before the principal became due. In point of fact, the sale took place on the 24th of March, 1874, more than three months after the principal became due. I do not see that any injustice has been done to the mortgagor by this decree, nor that it can justly be regarded as an invasion of his legal rights. There appears to be no good reason for vacating it. The rule is therefore discharged, with costs.

Curry v. Glass.

CURRY and others vs. GLASS and others.

1. A creditor, admitted as such by rule under an attachment, has a lien on the property attached, which entitles him to maintain a bill to remove the encumbrance of a conveyance, made with intent to defraud the creditors.

2. It is not necessary, in such case, that the consideration of the debt should be stated in the bill. The claim of the creditor, verified by affidavit, as required by the statute, (which appears by the bill,) is a subsisting debt for the purpose of creating the lien.

On motion to dismiss bill.

Mr. F. H. Teese, for the motion.

Mr. C. Borchertling, Jr., contra.

THE CHANCELLOR.

This case comes before me on a motion to dismiss the bill for want of equity. No objection was made on the argument to this mode of testing the bill. Without recognizing the practice of moving to dismiss a bill for want of equity, I shall consider the question presented as if submitted on general demurrer. The complainants are the owners of two judgments recovered in 1873, against the defendant, John Glass, in the state of New York; one by them in the Supreme Court, for \$1108.04; and the other, recovered by the Fifth National Bank of the city of New York, in the Supreme Court of that city, for \$1607.94, and assigned to the complainants. An attachment was issued against the property of Glass, who is a non-resident, on the 30th of January, 1874, out of the Circuit Court of Essex county, under the "Act for the relief of creditors against absconding and absent debtors," which was levied on certain land in Newark, of which the bill alleges Glass is the real owner, and which it states and charges he has, since the recovery of the judgments above mentioned, conveyed away with intent to defraud the creditors.

Hewitt and Ward v. Montclair Railway Co.

st mortgage had proceeded to interlocutory decree *pro confesso*, with the usual order of reference in such cases. The petitioner asks to be admitted as a defendant to both suits, to the end that he may have an opportunity of contesting the complainant's claims therein. His prayer must be denied as to the suit on the second mortgage. By the final decree in that suit, the railway company and all persons claiming and claiming under them, were foreclosed of all equity of redemption and claim in and to the mortgaged premises, or so much thereof as should be sold under the decree. The petitioner is bound by that decree.

In the suit on the first mortgage he will be admitted as a party defendant. He is bound, however, by all the proceedings in that suit up to the time when he acquired his title; he will, therefore, not be permitted to answer. He may be present at the taking of the account and may avail himself of all defences of which the company could avail themselves, but an interlocutory decree *pro confesso* against them and order of reference.

By the fourth section of the act of March 17th, 1870, (*Amph. L.*, p. 41,) it is provided that where, after the commencement of a suit in this court, any person shall acquire an interest in the subject matter of the suit, such as would be required that he should have been made a party if acquired before the commencement of the suit, it shall not be necessary to file a supplemental bill to make such person a party, but he may be made a party on petition; he shall be bound, however, by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by his admission, except for such time as it may seem to the Chancellor absolutely necessary to take the evidence regarding his claim. The sixth section provides that in such case any person may be made a party, either before or after final or interlocutory decree, but such decree shall not be opened or set aside thereby. The order to show cause granted on the petition in the suit on the second mortgage, is discharged with costs. The subsequent

Sire v. Wightman,

order restraining the master, to whom the execution in that case was issued, from paying to the complainants the money decreed to be due them therein, is also discharged. The prayer of the petition in the other suit is granted, so far as to admit the petitioner as a defendant, but without leave to answer.

SIRE vs. WIGHTMAN and others.

1. Acceptance of interest upon a mortgage, without claim of forfeiture, after the expiration of the time when, by its terms, the principal became due, accompanied by an acknowledgment of the receipt, as of the very day on which it fell due, and the receipt of interest on the mortgage subsequently, without any claim of forfeiture—*held*, a waiver of the forfeiture.

2. The holder of that mortgage was third mortgagee, and a bill had been filed by the second mortgagee to foreclose his mortgage, and a final decree had been entered in favor of the first, second, and third mortgagees. The owner of the equity of redemption had permitted the suit to proceed to decree and execution, expecting to be able to pay off the first and second mortgages before sale. He has paid them off, and now asks that the execution be stayed except as to the costs of the holder of the third mortgage, which is not yet due. Execution stayed, on the payment of costs and interest.

On petition to stay execution for sale of mortgaged premises.

Messrs. Stone and Jackson, for petitioners.

Mr. A. W. Bell, contra.

THE CHANCELLOR.

The complainant filed his bill for foreclosure and sale of certain premises to satisfy his mortgage, which was the second one on the property. He made the respective holders of the first and third mortgages, parties defendant. A final decree

Sire v. Wightman.

was entered in favor of the first, second, and third mortgagees for their respective mortgage debts, with interest and costs, and an execution was issued on the 23d of January, 1874, accordingly. Wightman, the owner of the equity of redemption, having paid off the first and second mortgages, filed his petition praying that the execution may be stayed, except so far as the costs of the holder of the third mortgage are concerned. He insists that the principal of that mortgage is not due, and will not be until 1878, and he claims that there are no arrears of interest. Owens, the holder of that mortgage, on the other hand, insists that in 1871 the principal became due by reason of a default for more than ten days, in the payment of the interest, which became due on the 24th of June in that year. The mortgage contained a provision that if any interest should remain due and unpaid for ten days, the principal should thereupon become due. It appears, however, that he received that interest in July or August of that year, from Wightman, who, about that time, became the owner of the property, and that the receipt for it was, by Owens' direction, dated as of the day on which the interest became due. Every payment which has accrued since then has been promptly met, and all of them received up to the one which became due after the bill was filed, and that, though duly tendered, was refused, on the ground that the principal had become due, by the default in the payment of interest due in June, 1871. The evidence is, that neither when that interest was paid, nor at any time since, up to the commencement of this suit, was any claim of forfeiture made by Owens. He indeed said, when he received that interest, that he might want the principal, or some part of it, in the ensuing spring, but it does not appear that he made any claim that the principal was due, or made any reference to the clause under which the forfeiture is claimed, or referred to the effect of the default, which had taken place. He did not ask for the principal or any part of it, until December, 1873. Wightman was not aware of the existence of the clause until after he paid the interest due to June, 1871.

 Bell v. Gilmore.

The mortgage was made by a former owner of the property. Under the circumstances, Owens ought not to be permitted to compel, by means of the decree and execution, the payment of the principal of his mortgage. He should have his interest and costs, and on the payment thereof the execution should be stayed. His acceptance of the interest, which was due in June, 1871, accompanied as it was by his deliberate acknowledgment of the receipt as of the very day on which it had fallen due, was a waiver of the forfeiture to which he had become entitled. To this is superadded his acceptance of the interest from time to time as it became due, for two years thereafter, up to the commencement of the suit. *Amott v. Holden*, 18 Q. B. 593.

Wightman permitted the foreclosure suit to proceed decree and execution, in the expectation of being able to raise the money to pay off the first and second mortgages before sale. His admission to defend himself against the third mortgage has done no injury to the holder of that encumbrance, nor does it preclude him from the relief to which he would otherwise be entitled.

BELL vs. GILMORE and others.

1. The sheriff's return "served" upon the subpoena, is presumptive proof of the service of the notice required by the 38th rule.

2. A personal decree for deficiency of proceeds to pay the mortgage debt, does not become a lien upon the real property of the person against whom it is taken, until after the sale, and in case a deficiency is found to exist. Hence, a motion to vacate a personal decree for deficiency, when only the interest of the mortgage was due at the date of the decree, but the principal did not become due till two months afterward, was refused, it appearing that the sale did not take place until after the principal became due.

On rule to show cause. Motion to vacate personal decree for deficiency against Charles H. Ingalls.

Bell v. Gilmore.

Mr. John W. Taylor, for the motion.

Mr. A. W. Bell, contra.

THE CHANCELLOR.

The final decree in this suit, dated October 1st, 1873, contained a personal decree against the mortgagor, for any deficiency which might exist after the application of the proceeds of the sale of the mortgaged premises, to the payment of the money secured by the mortgage. It appears that at the date of the decree, there was due on the mortgage, only the interest—\$568.75. The principal would not become due until the 13th day of December, following. The mortgagor moves to set aside the decree for deficiency, on two grounds: First, that no notice was served according to the 38th rule of this court, which provides that in foreclosure suits no decree shall be made for the payment of the deficiency of the proceeds of sale, to satisfy the mortgage debt, by any defendant legally or equitably liable therefor, unless such decree be specifically prayed in the bill, and a ticket or notice, stating that such relief is sought against him, be served on such defendant with the subpoena, or in case of absent defendants, served with the order to appear, or if the order be advertised, mailed with a copy of such order, prepaid and directed to such defendant, at the post office nearest his residence, or at which he usually received his letters, or be served or published in such manner as the Chancellor shall direct; and second, that at the date of the decree the principal was not due.

As to the first of these objections: The mortgagor, at the commencement of the suit and ever since, has been a resident of this state. He was served with subpoena to answer. Attached to that suit is a notice, in accordance with the rule above referred to. The bill prays for a decree for deficiency against him. He does not say that the notice was not served upon him; but insists that it does not appear that it was served upon him; that is, he insists that the sheriff's return "served," upon the subpoena, is not the evidence of service of the notice which

Bell v. Gilman et al.

should be required under the rule. The rule in question is silent as to the mode of proof of service. The act on which it is based *Nix. Dig.* 119, makes no provision for notice. Like the tenth section of the act respecting the Court of Chancery, (*Nix. Dig.* 107,) which provides for the service of a ticket in foreclosure suits, on every defendant other than the mortgagor, his heirs, executors, administrators, or assigns, the rule directs that the ticket be served with the subpoena, the defendant be found to be served therewith, but it does not, as that section does, direct that it be served by the officer serving the subpoena. Under the section of the chancery act just referred to, the practice has been uniform in regard to the proof of service of the ticket. The sheriff's return "served" has been taken as presumptive proof of the service of the ticket. Such, too, has been the practice for many years under the rule under consideration. I see no good reason for adopting a different practice. But in addition to the fact that the mortgagor does not deny that the notice was served on him, it appears that on the 8th of October, a very few days after the day for appearance named in the writ, he caused his appearance to be entered in the suit.

The second objection is based on the ground, that the decree when entered, became a lien upon all the real property of the mortgagor. This is an error. Although by the supplement to the act respecting the Court of Chancery, (*Nix. Dig.* 11 § 92,) it is enacted that all decrees and orders of this court whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation, and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such decree, yet this decree was not for a specific sum, but merely for the deficiency, if any, which should, on sale of the premises, be found to exist. It was merely a contingent decree, and could not be a lien until after the sale of the mortgaged premises should have taken place. *De Agreda v. Mantel*, 1 Ab. Pr. R. 130; *Cochran v. Thornton*, 8 How. Pr. R. 66; *Chapin v. Broder*, 1 Cal. 403; *Englund v. Lewis*, 25 Cal. 337. As was sa-

Bell v. Gilmore.

in **Chapin v. Broder**: "A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered by it is ascertained and fixed, no effect can be given to it as a lien. In the present case the provisions in question were of this character, and no general lien was acquired by the docketing of the judgment. There was no personal judgment for this amount, nor was there anything in the nature of a personal judgment, beyond the mere direction for the issuance of the execution in the event of the insufficiency of the mortgaged property to pay the debt. The whole matter was contingent, indefinite, and uncertain, and so long as this continued to be the case, no effect whatever could be given to it." It therefore becomes important to inquire when this provision in the decree in this case began to have the force, operation, and effect of a judgment. That was, at the earliest, when the sale took place. The execution for the sale of the mortgaged premises, was issued on the 11th of October, 1873. The notice required by law, would not have admitted of an earlier day of sale than the 11th of December. The principal became due on the 13th of that month. It was not insisted, nor even suggested, on the argument, that the sale had taken place before the principal became due. In point of fact, the sale took place on the 24th of March, 1874, more than three months after the principal became due. I do not see that any injustice has been done to the mortgagor by this decree, nor that it can justly be regarded as an invasion of his legal rights. There appears to be no good reason for vacating it. The rule is therefore discharged, with costs.

Curry v. Glass.

CURRY and others vs. GLASS and others.

1. A creditor, admitted as such by rule under an attachment, has a **li** on the property attached, which entitles him to maintain a bill to remo the encumbrance of a conveyance, made with intent to defraud the credito

2. It is not necessary, in such case, that the consideration of the **de** should be stated in the bill. The claim of the creditor, verified by **affi** vit, as required by the statute, (which appears by the bill,) is a subsist~~i~~ debt for the purpose of creating the lien.

On motion to dismiss bill.

Mr. F. H. Teece, for the motion.

Mr. C. Borchertling, Jr., contra.

THE CHANCELLOR.

This case comes before me on a motion to dismiss the b~~i~~ for want of equity. No objection was made on the argum~~e~~ to this mode of testing the bill. Without recognizing t~~h~~ practice of moving to dismiss a bill for want of equity, I sha~~n~~ consider the question presented as if submitted on gener~~a~~ demurrer. The complainants are the owners of two judg~~e~~ ments recovered in 1873, against the defendant, John Glas~~s~~ in the state of New York; one by them in the Supren~~t Court, for \$1108.04; and the other, recovered by the Fift~~h~~ National Bank of the city of New York, in the Supren~~t Court of that city, for \$1607.94, and assigned to the complain~~ants~~. An attachment was issued against the property **Glass**, who is a non-resident, on the 30th of January, 187 out of the Circuit Court of Essex county, under the "Act f~~o~~ the relief of creditors against absconding and absent debtors~~s~~ which was levied on certain land in Newark, of which t~~h~~ bill alleges Glass is the real owner, and which it states an~~d charges he has, since the recovery of the judgments abo^v mentioned, conveyed away with intent to defraud the credito~~r~~~~~~~~

Curry v. Glass.

Complainants, having filed with the clerk of the court, of which the attachment issued, an affidavit of their debt, admitted by rule as creditors under the attachment.

Bill is filed to remove the encumbrance of the conveyance referred to, and the sole question is, whether the complainants, as creditors admitted under the attachment, can maintain this action. That the plaintiff in attachment could do so, cannot be doubted. *Hunt v. Field*, 1 Stockt. 36 ; *Williams v. Michenor*, 3 Stockt. 520 ; *Robert v. Hodges*, 1 C. E. Ben 299. The bill is expressly in aid of the attachment, and success of the complainants in this suit would enure to the benefit of the plaintiff in the attachment and all the creditors who have come in or who may be admitted under it. The question then, is, whether a creditor, admitted as such by rule under an attachment, has a lien on the property attached. It is clear that he has. The attachment binds the property, not for the benefit of the plaintiff alone, but for his debt, and the claims of all applying creditors. The suit cannot be discontinued without the consent of those creditors. When the sale of the property is made, it is to pay their claims, as well as that of the plaintiff. If the amount realized be insufficient to pay the claims in full, then it is to be ratably apportioned among the plaintiff and the applying creditors. Said the court in *Duffin v. Wolf*, 1 Zab. 476, "The statute makes the levying of the attachment a lien for the equal benefit of all the creditors who shall apply to the court or to the auditors for that purpose. It holds the property of the defendant bound for the satisfaction of the claims of all the applying creditors." The complainants then, have a lien upon the property attached, by virtue of which they may maintain this suit.

The bill states the issuing of the attachment, and the levy under it, the oath of the complainant's agent (they are non-residents) to their debt, the filing of the affidavit, and their admission as creditors under the attachment. This statement of their debt is sufficient. It appears from the bill, it may be remarked, that their debt sworn to is the amount claimed

Dayton v. Dusenbury.

to be due them on their judgments. But it is not necessary that the consideration of the debt should be stated. The law recognizes the claim of the creditor after it has been verified by affidavit, as prescribed by the statute, as a subsisting debt, for the purpose of creating the lien. *Robert v. Hodges*; *Hunt v. Field*, *supra*.

The motion is denied, with costs.

DAYTON vs. DUSENBURY and others.

1. A judgment recovered against a debtor, whose wife, to whom he was married before the passage of the married women's act of 1852, was possessed of separate real estate before the passage of that act, is a lien upon his life estate therein.

2. A suit to foreclose a purchase money mortgage on lands, conveyed to the mortgagor by deed with covenant against encumbrances, which were, at the date of the deed, and at the commencement of the suit, subject to judgments, the amount due on the judgments exceeding that due on the mortgage, so that no deduction could be made from the mortgage debt, stayed until the premises should be released from the lien of the judgments.

On final hearing on pleadings and proofs.

Mr. A. A. Clark, for complainant.

Mr. John T. Bird, for Mrs. Dusenbury.

THE CHANCELLOR.

The bill is filed for foreclosure and sale of mortgaged premises, land in Hunterdon, conveyed January 28th, 1870, by the complainant to the defendant, Mrs. Dusenbury. The mortgage in suit was given to secure \$1000 of the purchase money of that conveyance, with interest. The defence is, that at the time of the conveyance, which was by deed with covenant against encumbrances and warranty general, the premises were, and still are, subject to the lien of certain judgments, one against Peter Melick, who owned the property

Dayton v. Dusenbury.

from February 26th, 1861, to September 14th, in the same year, and five others against John C. Rafferty, whose wife (now deceased) owned them from May 29th, 1840, to February 26th, 1861, when she with her husband conveyed them to Melick. The judgment against Melick was recovered in the Circuit Court of Hunterdon, March 1st, 1858. Those against Rafferty were recovered in the same court, in the years 1857 and 1858. The property, at the time of filing the answer, was subject to prior mortgage encumbrances, also set up in the answer, from which it has since been released. The judgment against Melick, if it has not been satisfied, or the land released from its lien, is, of course, an encumbrance on the property. It is insisted by the complainant, that those against Rafferty are not, by force of the second section of the "act for the better securing the property of married women," approved March 25th, 1852, a lien on the premises. The property in question was conveyed to Mrs. Rafferty before her marriage to Mr. Rafferty, which took place in 1841. There was issue of that marriage, four living children. The act of 1852 left Mr. Rafferty's tenancy by the curtesy, as it stood at the common law, unaffected. He therefore, at the birth of the oldest child, which took place in 1843, had an estate for his life in the premises, which he still held when the judgments were recovered against him, for they were all recovered before the conveyance was made by him and his wife to Melick. He is still living. The judgments are therefore liens upon his life estate. *Van Note v. Downey*, 4 Dutcher 219; *Prall v. Smith*, 2 Vroom 244. The judgment against Melick was for \$251.49. Those against Rafferty were for \$1849.54, in the aggregate an amount far exceeding the mortgage. Under the circumstances, a decree cannot be made for the complainant, directing a deduction of the amount due on the judgments, from the amount due on the mortgage. This suit must therefore be stayed until the premises shall have been released from the lien of the judgments. *Van Riper v. Williams*, 1 Green's Ch. 407; *White v. Stretch*, 7 C. E. Green 76.

 Cassidy v. Bigelow.

CASSIDY and others vs. BIGELOW and others.

The complainants, trustees and *cestuis que trust*, held a second mortgage on premises on which a defendant held the prior mortgage. The defendant was interested as a *cestui que trust* under the second mortgage. He also had a claim against the mortgagors, which was not secured by mortgage. The complainants were permitted to redeem his mortgage, and he was compelled to accept the amount of the principal, interest, and costs of the decree and execution in foreclosure on his mortgage, which was deposited in court on his refusal to accept it when tendered to him, with interest on it at the rate (four per cent. per annum) allowed by the rule of the court, since the default was made, and to assign the decree and execution to secure to those of the *cestuis que trust* under the second mortgage, who had contributed for the redemption, the repayment of their contribution, with interest. For the protection of the defendant's interest under the second mortgage, it was decreed that no sale of the mortgaged premises under the decree should be made, except by order of this court.

On order to show cause why an injunction should not be issued restraining the defendant, Bigelow, and the sheriff, from selling under an execution for the sale of mortgaged premises.

Mr. Gilchrist, for complainants.

Mr. C. Parker, for defendant, Bigelow.

THE CHANCELLOR.

The complainants, George W. Cassidy, Francis T. Lillien-
dahl, Virgil de Escoriaza, and Simon Bernheimer, as trustees,
and Simon Bernheimer and Virgil de Escoriaza in their own
right, and the Marine National Bank, the National Park
Bank, and other individuals and corporations, file their bill to
redeem. The trustees are holders of a mortgage to secure
the payment of over \$200,000 upon the brewery premises of
Mummelt and Leicht, in Hudson county, on which the de-
fendant, Bigelow, when they took their mortgage, held a

Cassidy v. Bigelow.

prior mortgage for \$50,000, and interest. Upon this mortgage he had then obtained a decree for foreclosure and sale, in this court. That decree is still unsatisfied. An execution was issued upon it, under which the premises have been advertised for sale by the sheriff, but no sale has as yet taken place, adjournments having been made from time to time. At the filing of the bill the defendant, Bigelow, threatened to proceed to sale. The trustees hold their mortgage in trust for various creditors of Rommelt and Leicht, among whom are two of their own number, and the other complainants, and the defendant, Bigelow. The premises comprised in the mortgage consist of about two acres of land, in what was formerly Hudson City, (now included in the boundaries of Jersey City,) on which is a very large brewery of costly construction, with stables, wagon-houses, wagon-shop, a large cooperage, a large dwelling-house for workmen, a saloon in a large frame building, a bowling-alley, and a summer-house, and the private dwelling-house of Rommelt and Leicht, the mortgagors. In addition to this property, the mortgage of the trustees covers two plots, containing nearly an acre, adjoining the land covered by the first mortgage, and about eight city lots, near to, but not adjoining the premises described in the first mortgage. The trustees hold, besides, as security for their mortgage debt, a chattel mortgage of all the tools, machinery, and implements, casks, barrels, wagons, horses, and other personal property, belonging or relating to the brewery or its business. This personal property is of the value of about \$30,000, and if sold apart from the brewery, must be sold at a comparative sacrifice. The business is now successfully carried on by Rommelt and Leicht, who, since the giving of the mortgage of the trustees, have paid on account of the debt secured thereby, about \$54,000, and there is now unpaid on account of it, \$154,000, of which unpaid indebtedness, the amount of \$126,000 is held by those of the beneficiaries under the second mortgage who have contributed to redeem the first. The premises are more valuable to Rommelt and Leicht than to anybody else. The part

Cassidy v. Bigelow.

covered by the first mortgage is by far the most valuable part of them, the buildings being upon it. The property, if sold at this time, would not, it is alleged, bring over half of its value, and a sale would endanger, if not destroy, the complainants' security. The interest of the defendant under the second mortgage is about \$6000. The defendants, Rommelt and Leicht and their wives, have answered, consenting to the substitution of the complainants in the place of Bigelow, as the owner of the decree, and admitting that the payment thereof by the complainants, or any of them, should not extinguish the debt or lien of the decree, and consenting that the decree shall remain a first lien on the premises mentioned therein, subject to a prior mortgage of about \$2300, on part of those premises.

The complainants ask to be permitted to redeem Bigelow's mortgage, in the interest and for the protection of the trust under their mortgage. Before filing the bill they applied to Bigelow, and requested him to permit them to redeem his mortgage, tendering themselves ready to pay the amount due on the decree and execution, on his executing an assignment thereof to them, but he refused. He expressed his willingness, however, to accept the amount tendered in payment of the decree, and acknowledge satisfaction, but refused to permit the complainants to be substituted by virtue of such payment, to his rights under the decree.

Bigelow has answered, admitting the facts above stated. He resists the complainants' claim to subrogation, on the ground that he, having a debt secured by the mortgage of the trustees, and another debt due from Rommelt and Leicht, not secured by mortgage upon the brewery premises, has a right to protect those claims by means of his mortgage, and that, he thinks, can be best done by compelling payment. His counsel argues that his equity is equal to that of the complainants, and that, therefore, if this court should allow the desired subrogation, he, by virtue of his interest under the mortgage to the trustees, might, in turn, successfully apply to be permitted to redeem the mortgage now held by him from

Cassidy v. Bigelow.

He further insists that, if the substitution be allowed, complainants will, by reason thereof, have the advantage of him which he now has over them. But no such result can be anticipated. It is admitted that, notwithstanding the statement in the answer to the contrary, the application to redeem is made in behalf of the whole trust, including, of course, the defendant's claim thereunder, although the complainants, other than the trustees, have alone contributed the whole of the money requisite to the redemption. This court cannot see to it that in the subrogation, no advantage is given to the complainants, to the prejudice of Bigelow's interest as beneficiary under the mortgage held by the trustees. The case is under the control of this court. If it be decreed to give as security to the complainants for the amount advanced to redeem Bigelow, with the restriction that sale of the mortgaged premises under it shall not be made without the order of the court, it is difficult to see how Bigelow's interest, under the mortgage of the trustees, can be prejudiced. The right of the mortgagees under that mortgage to redeem, under the circumstances, is clear. Tacking is not permitted in this case; nor will the fact that the prior mortgagee has an interest under the subsequent one, prevent the court from decreeing the redemption.

In *Saunders v. Frost*, 5 Pick. 259, the holder of the first and second mortgages was, with two other persons, the holder of the third. He was in possession under the first and second.

The two who were interested with him in the third mortgage, applied to redeem him as to the first and second mortgages. He resisted, on the ground of his interest in the third mortgage, insisting that he was entitled to hold the premises until his debt under that mortgage should be paid, and that, therefore, the complainants should be required to redeem him not only as to the first and second mortgages, but also as to his interest under the third. It was held that they might redeem him as to the first and second mortgages, and though they could not compel him to contribute, he could not avail himself of his interest in the third mortgage, but they would

Cassidy v. Bigelow.

be entitled to possession until they were reimbursed his proportion, and that, if he elected to hold under the third mortgage, he should contribute to the redemption of the first and second, in the proportion his interest in the third bore to that of the other two mortgagees.

Bigelow claims that, inasmuch as in his judgment it will be to his interest, with a view to the collection of his debt, which is not secured by mortgage on the brewery, that his debtors should be compelled to pay off his mortgage, the court will not compel him to assign that mortgage. It is difficult to see how the collection of the debt, unsecured by mortgage, is to be facilitated or accelerated by compelling the debtors to pay off his mortgage, but were such a result to be expected, that would not prevent the court from doing equity between him and the trustees as mortgagees. It is the equitable right of the trustees to be permitted to redeem his mortgage, and to hold the premises under it, until they shall have been reimbursed their necessary expenditure to that end—the principal, interest, and costs due on the decree. And they have a right to an assignment of the decree. *Pardee v. Van Anken*, 3 Barb. R. 534; *Arvill v. Taylor*, 8 N. Y. 44; *Chesebrough v. Millard*, 1 Johns. Ch. 409; *Serous v. Cooper*, *Ib.* 425; *Smith v. Green*, 1 Coll. 555; *Ex parte Crisp*, 1 Atk. 133. The complainants, on filing the bill, paid into court the full amount, \$56,975, due on the decree. They had previously tendered it to Bigelow, who, as before stated, refused to receive it, except in satisfaction of the decree. He is not entitled to interest on the money secured by the decree, except that which is allowed on money paid into court. *Atson v. Deibel's Exrs.*, 1 Eq. Ca. Abr. 319.

The order to show cause will be made absolute, and an injunction will be issued restraining Bigelow from selling under the decree. On his executing an assignment of the decree and execution to the trustees, in trust, to secure to the contributing complainants the repayment to them of the amount by them contributed to the redemption, with interest, on so much thereof as is principal, from the time when the

Cool's Executors v. Higgins.

money was paid into court, he will be permitted to take the money deposited, with the interest on it, payable under the rule of this court.

For the complete protection of Bigelow, in respect of his claim under the mortgage held by the trustees, no sale under the execution will be permitted without the previous order of the court.

COOL'S EXECUTORS vs. HIGGINS and others.

1. Under peculiar circumstances, the amount of certain encumbrances which were upon lands sold under the act "to authorize the sale of lands limited over to infants, or in contingency, in cases where such sale would be beneficial," and clear of which they were sold by the master, allowed out of the proceeds of sale.

2. Executors suing for legacies charged upon land, after the estate has been settled, and having no interest whatever in the legacies, cannot maintain the suit without joining the legatees, as complainants with them.

Leonard C. Cool, by his will dated December 19th, 1860, and proved on the 24th of May following, after directing payment of his debts and funeral expenses, gave to William Davis \$100, and to David Deats and Leonard Cool Davis \$50 each, these legacies, however, were not to be paid in ten years unless the proceeds of his farm, over and above keeping up the repairs, farming utensils, and stock, and the support of his wife and his two children, should be sufficient to pay them, but were to be paid whenever the surplus should be sufficient for the purpose. To his two daughters, Anna and Mary, the children above mentioned, he gave all his property, subject to the charges and restrictions thereafter mentioned, for life, with remainder in fee to their lawful issue (who were to take *per stirpes*,) or, if only one of his daughters should leave lawful issue, to such issue in fee, on the death of the survivor of his daughters. In the event of the death of both of his daughters without leaving lawful issue, the

Cool's Executors v. Higgins.

property, subject to the charges and provisions before referred to, was to go to his brother Andrew and his sisters Mary Ann and Margaret, and the survivors and survivor of them, in fee. To keep a home for his family, he directed that his wife and daughters should occupy his farm and share equally in its produce and proceeds, each to have a third of the surplus during life, subject to the provisions before alluded to, but if either of his daughters should leave the homestead, she was to receive only a third of the surplus after the support and clothing of her mother and sister should have been taken out. Out of the proceeds of the farm, as a common fund, they were to keep up the property as well in implements and stock, as in buildings, fences, &c. They were not to encumber that property, but in case of the destruction of the buildings by fire or other misfortune, which would make it necessary to raise money, or if it should be necessary to raise money for their support, they were to mortgage two lots of land which he designated for the purpose. The will declared that this provision for his wife was in lieu of dower. It provided that if his wife should re-marry, she should, in lieu of the provision made for her as above stated, only be allowed the property she brought him, and an annuity of \$50 for fifteen years after her re-marriage; the annuity to cease, however, on her death, before the expiration of that period. The testator directed that the lot owned by him in the burying ground, at Larison's corner, should be enclosed by his executors, with a neat and substantial fence, to be made in whole or in part of iron, and that the lot be kept up in a neat, tasteful, and ornamental manner. The will charges the testator's estate with the payment of the legacies, expenses, and whatever may be needed for the purpose of carrying out the will.

On the 27th of November, 1867, the real estate of the testator was sold at public auction, by the order of this court, under and by virtue of proceedings under the act "to authorize the sale of lands limited over to infants, or in con-

vey, in cases where such sale would be beneficial," and then purchased by the defendant, Nathaniel Higgins, at

Cool's Executors v. Higgins.

the price of \$17,020.58. The sale having been confirmed, a deed of conveyance in fee simple was made to him, pursuant to the order of this court, on the 28th of March, 1868, and the money paid into court. On the 7th of August, 1872, the surviving executors filed their bill against Higgins and the persons other than the legatees interested in the fund, to compel payment of the legacies and the amount necessary to build the fence around the cemetery lot, and to put and keep the lot in order, according to the directions of the will in that behalf. The personal estate, except an insignificant balance, was exhausted in the payment of the debts and funeral and testamentary expenses.

The cause was argued on final hearing, upon the pleadings and proofs.

Mr. G. A. Allen, for complainants.

Mr. A. Wurts, for defendant, Higgins.

THE CHANCELLOR.

This case was before this court in 1873, upon a general demurrer, filed by the defendant, Higgins, to the bill of complaint. *Cool's Executors v. Higgins*, 8 C. E. Green 309. The late Chancellor there held that the executors could maintain the suit for the recovery of the money requisite to enable them to comply with the direction of the will in respect to the cemetery lot, but expressed no opinion as to whether they could maintain it so far as the legacies due to the respective legatees are concerned. He held that Higgins purchased the land subject to the encumbrances on it. It now clearly appears, that at the sale under the act "to authorize the sale of lands limited over to infants, or in contingency, in cases where such sale would be beneficial," the master, prior to setting up the property, publicly proclaimed to the bidders and to all who were in attendance, that the premises would be sold free and discharged of all liens, charges, and encumbrances

Cool's Executors v. Higgins.

thereon, under or by virtue of the will. All the persons in being, who were interested in the property, were parties to the proceedings under the act, and were duly brought in under them. The solicitor of the petitioner therein, (the petitioner was one of the life tenants,) assured Higgins at the sale, and before he purchased, that the land was to be sold free of all encumbrances, and the husband (a lawyer) of the other life tenant gave him the same assurance at the same time. Higgins, relying on these representations and assurances, bid for and purchased the property, and paid the purchase money and took his deed, accordingly.

That he would, under the circumstances, have been relieved from his purchase, on application in due time, on the ground of mistake arising from the proclamation and assurances referred to, there can be no doubt. That he made no application was due to his confidence in them. The bill in this cause was not filed until over four years after his deed was delivered to him. All those who are interested under the devise, except the legatees, are parties to this suit. The fund derived from the sale was brought into court. The late Chancellor, in the order fixing the allowance to the owners of the particular estate, provided for the payment out of the interest, of the legacy of \$50 a year, for fifteen years, given to the testator's widow by the will, in the event of her remarriage. By decree of May 9th, 1871, he set apart a part (\$86.10) of the annual interest of the fund for accumulation, for the benefit of those in remainder. The owners of the property have had the benefit of a sale of the premises free of the encumbrances in question in this suit, and the fund in court is correspondingly greater, accordingly.

This fact did not appear in the case when it was before the late Chancellor. The conclusion at which I have arrived depends on the peculiar circumstances of this case, and does not, therefore, militate against the doctrine expressed in his opinion, that the purchaser at such a sale buys, subject to existing encumbrances. The payment to the testator's widow of the annuity above referred to, out of the fund in court,

Cool's Executors v. Higgins.

It may be observed, in conflict with that opinion. It appears to me clear, that as between Higgins and the fund, the equities are all in favor of the former. There can be no equity in compelling him, under the circumstances, to pay the money charged on the land. The fund should pay it.

It was objected on the hearing, that the executors were not entitled to a decree as to the legacies to William Davis, David Deats, and Leonard C. Davis. The bill alleges that the legatees look to and call upon the executors for payment. The executors, therefore, may be regarded as filing the bill as trustees for the legatees. But, if so, the legatees should have been made complainants, with the executors. They are not parties to the suit. The estate has been settled so far as payment of the debts is concerned, and all the personal estate has been administered, except a balance of \$20.69, remaining in the hands of the executors. The executors have no interest in those legacies. They therefore file their bill as to them as mere naked trustees. It does not appear, except from the statement of the bill above mentioned, that the legatees have authorized them to collect their legacies, or that they are desirous that they should be collected. The cause must stand over until the necessary amendment be made by making the legatees, parties complainant. *Fish v. Howland*, 1 Paige 20. When that shall have been done there will be a decree directing the payment of the legacies out of the fund, and for a reference to ascertain the amount due on the legacies, and the amount requisite to be paid to the executors to answer the directions of the testator in respect to the lot in the cemetery, (the testimony on this head not being explicit enough to warrant a decree without a reference,) and also to ascertain the proportions in which those amounts should be borne by the estates for life and in remainder, respectively.

Leggett v. Doremus.

LEGGETT vs. DOREMUS and others.

1. A judgment recovered against a devisee for life, vested under the will with power to consent that the executors should sell the real estate at their discretion, and appropriate the income for the support of such devisee and his family, during the devisee's life, does not work an extinguishment of the power. The lien of the judgment is subject to the power.

2. The power to consent to a sale is not extinguished in all cases where the donee of the power is the life tenant, even by the absolute alienation by him of his life estate. The rule is, that so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power.

3. When a power is executed, the person taking under it, takes under him who created the power, and not under him who executes it. The only exceptions are, when the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party; it is a proceeding *in invitum*, and therefore falls within the rule.

On motion to dissolve injunction.

Mr. W. S. Whitehead, for the motion.

Mr. J. W. Taylor, contra.

THE CHANCELLOR.

Goline Doremus, who died about April 1st, 1873, by his will gave and devised to his son Charles the use and occupancy of a certain lot of about half an acre of land in Bloomfield township, in the county of Essex, with the buildings and improvements thereon, during Charles' natural life, free and clear from all encumbrances, and after Charles' death, to the surviving children of Charles, in equal shares. The will also provides that the land may, nevertheless, be sold and conveyed in the lifetime of Charles, by his consent in writing, at the discretion of the executors, and that if the sale should

Leggett v. Doremus.

be so made, the net proceeds thereof shall be considered and disposed of as part of the residue of the testator's estate; which residue he, by the will, gave and devised to his executors in trust, to be held by them after the decease of his wife, and the net interest or income thereof to be paid or appropriated at their discretion, for the support of Charles and his family, during the lifetime of Charles; after his decease such residue is to be equally divided between the surviving children of Charles. The executors named in the will are, the testator's wife, his son Charles, Joseph K. Oakes, and Thomas C. Dodd, all of whom, except the widow, proved the will. The complainant, on the 25th of July, 1873, recovered a judgment in the Circuit Court of the county of Essex, against Charles and his son Michael, for the sum of \$686.26, and on the 5th of August, of the same year, issued a *fiery facias de bonis et terris*, and caused it to be levied on the right, title, and interest of the defendants in the land above mentioned. The bill alleges that sufficient goods and chattels of the defendants not being found, the sheriff, in order to satisfy the judgment, has advertised for sale the right, title, and interest of the judgment debtors in the land, but that the complainant is apprehensive that Charles will, for the purpose of putting the property beyond the reach of the complainant, and to hinder and defeat him in the collection of his judgment debt, consent and procure, unless prevented by this court, a sale and conveyance of the property before it can be sold under the execution. It further states that, if such consent should be given, and the executors should sell and convey the premises, the complainant will be defeated in the recovery of his debt, and the proceeds of the premises will be placed under the control of Charles, and put beyond the reach of the complainant and the other creditors of Charles. The bill prays that Charles and Michael may be compelled to pay and satisfy the judgment and execution, or to refrain from hindering and defeating the satisfaction thereof, by procuring a sale by the executors, and that Charles may, to the end that the property may be sold under the execution, be restrained

Leggett v. Doremus.

from consenting to a sale by the executors. On the filing of the bill an injunction was granted, and motion is now made to dissolve it, on the ground that there is no equity in the bill.

The claim to relief is based on the ground that the power to consent to a sale by the executors, is a power appendant, and that the judgment against Charles, works an extinguishment of it. The bill, however, alleges that the executors can make a good title notwithstanding the judgment, and its object is, obviously, not to prevent a cloud upon the title to be acquired under the judgment and execution, but to prevent the executors from selling the property under the power given by the will, in order that the complainant may thus, by sale of the life estate, be enabled to collect the amount due on his judgment. Why should the court do this? The trust did not proceed from the debtor, nor is any fraud alleged. The bill does not seek to reach any equitable interest of the debtor but merely invokes the restraining power of the court in aid of the levy made upon a legal estate, not with a view to removing a fraudulent encumbrance, or vacating a fraudulent conveyance, but to prevent the exercise of a power by the executors, a power with which they were invested by the testator for the purpose of protecting his bounty, and securing it to the objects for which it was bestowed, and to the persons whom alone he intended to benefit by it. The testator, in making this provision for sale, probably had in view the very contingency now presented—the effort of a creditor of Charles to subject the land to the payment of his debt. It is manifest that he intended to secure the property, or the proceeds of it, to the support of Charles and his family, beyond such contingency. If the complainant's judgment has indeed deprived Charles of the power to consent, there is no occasion for this suit. Said Lord Eldon, in *Thorpe v. Goodall*, 17 Ves. 388, where a bill was filed by the assignees of a bankrupt, who was seized for life, with a general power of appointment, with remainder in default of appointment to the heirs of his body, to compel him to execute the power of appoint-

Leggett v. Doremus.

ment for the benefit of his creditors, "If the estate of the bankrupt has passed under the assignment, so that the power is destroyed, then there is no occasion for this bill. If the transfer of the life estate has destroyed the power, according to the reasoning of Mr. Sugden in his book, (which is in many respects excellent,) that as it is a power, in a sense, coupled with an interest, that interest has so passed under the assignment that the power no longer exists, then the plaintiffs have nothing to do here." On the other hand, if the levy has not deprived Charles of the power to consent, (and that is the view presented by the bill,) on what ground can the aid of this court in the premises be successfully invoked? In *Wetmore v. Midmer*, 6 C. E. Green 242, a case somewhat similar to this, a judgment against a life tenant was held to be subordinate to an absolute power of sale vested in executors. In that case, the testator, by his will, gave to his son a life estate in his mansion-house and part of the grounds belonging to it. Subsequently in the will, he authorized his executors to sell and convey all or any part of his real estate. It was held by this court, that under that provision the executors had power to sell and convey in fee the mansion-house property devised to the son for life, and that their deed conveyed to, and vested in the grantee, the premises free of the life estate. *Bacot v. Wetmore*, 2 C. E. Green 250. The will was proved in 1852. In 1851 a judgment had been recovered and was still subsisting against the son, for a considerable sum, in the Supreme Court of this state. The executors sold the mansion-house premises in 1852, and in 1869, under an *alias* execution issued on the judgment above mentioned, a levy was made on that property. It was held that the subsequent power in the will to the executors to sell all or any of the lands devised, must prevail over the former devise, which must be taken as subject to this power and its execution, and that therefore it followed that the judgment and execution must be subordinate to the absolute power of sale vested in the executors. In the present case the devise is of the use and occupancy of the land to Charles for his life, free

Leggett v. Doremus.

from all encumbrances, with remainder to his surviving children in equal shares, with power to the executors to and convey the property in Charles' lifetime, notwithstanding that devise, at their discretion, but not without his written consent. In case of such sale, the proceeds are to go into the residue of the estate, and with it to be held in trust by the executors after the decease of the testator's widow, the net interest or income to be appropriated by them at their discretion, to the support of Charles and his family, and at his death the residue to be equally divided between his surviving children. Here, then, is a power of sale at the discretion of the executors, clogged only by the necessity of obtaining the written consent of Charles. The lien of the judgment and execution must be subject to this power and the exercise of it, at the discretion of the executors, unless the judgment works an extinguishment of the power. The complainant claims, that by virtue of the judgment, execution and levy, the power to consent is taken away: if not legally, at least equitably; and therefore, the power of sale is annulled; and that, in effect, is, that the judgment, execution and levy are to be regarded as an absolute alienation by Charles, from which he ought not to be permitted to derogate. He insists that the bankruptcy of Charles would destroy his power to consent, and therefore by parity of reasoning, the recovery of a judgment against him would do so. But, bankruptcy does not, in all cases, extinguish the power of the life tenant to consent to a sale. *Heworth v. Goose*, 29 Bear. 111; *Eisdell v. Hammersley*, 29 Bear. 255; *Simpson v. Bathurst*, L. R. 5 Chan. App. 19.

Nor is the power to consent to a sale extinguished in cases where the donee of the power is the life tenant, even in the case of an absolute alienation by him of his life estate. *Warburton v. Farn*, 16 Sim. 625; *Alexander v. Mills*, L. R. 6 Ch. App. 124; see also, *Long v. Rankin*, 2 Sugd. on Pow. (Am. ed.) Appx. 513; *Walmsley v. Butterworth*, Cood's Mortgages, App. 573; *Tyrrell v. Marsh*, 3 Bing. 31; *Davies v. Bush*, McCl. & Yo. 57; *Jones v. Winwood*, 10 Sim. 1; *Ben. v. Bulkeley*, Doug. 292.

Leggett v. Doremus.

The rule is, that so long as nothing is done in derogation of the alienor's estate, the alienation has no operation on the power. The donee cannot defeat his own grant. On this principle rests the decision in *Piers v. Tuite*, 1 Dru. & Wal. 279, which was a case where a person seized of a life estate in lands, and being indebted in various sums of money secured by his bonds, filed a bill to restrain proceedings at law on them, on account of usury, and then entered into a consent in the cause with his creditors, whereby it was agreed that a certain sum should be found due on a foot of those bonds, and the consent was embodied in the master's report and a decree pronounced declaring that that sum was due and well charged on the lands in the pleadings mentioned; and it was held that the consent was such an act or contract on the part of the debtor, as when acted on and embodied in the decree of the court, deprived him of the right of executing a power to charge the life estate with portions for younger children, so as to affect the rights of creditors under the decree which had attached upon his life estate.

But, is the complainant's judgment at law, in this case, to be regarded as an alienation of his life estate? Said Lord Tenterden in *Doe d. Wigan v. Jones*, 10 B. & C. 459, "It has been established ever since the time of Lord Coke, that when a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore, falls within the rule." In that case, an estate had been conveyed to such uses as a person should by deed appoint, and in the meantime, to the use of himself for life, and afterwards a judgment was recovered against him, and after the entry of the judgment, he mortgaged the property, appointing the use for five hundred years, and after the execution of that deed,

Leggett v. Doremus.

the judgment creditor sued out an *elegit*. It was held that the lien upon the land was defeated by the execution of the power.

In *Law v. Michelson v. Carter*, 5 T. R. 57, where a lessee covenanted not to alien or transfer away his lease, and afterwards acknowledged a judgment on which the lease was taken in execution and sold, it was held that this sale was not a forfeiture of the lease. In that case, the lessor brought an ejectment against the purchaser of the lease. Lord Kenyon said there was a difference between those acts which a party does voluntarily, and those which pass *in iudicio*; that judgments in contemplation of law always pass *in iudicio*, and that that was not an alienation within the meaning of the covenant.

There is no equitable ground in the bill on which this court can be asked to extend its support to the complainant's claim. On the other hand, it is rather its duty to give effect to the intention of the testator in the devise under consideration. The power of sale was not given for the benefit of Charles alone, but for the benefit of his family also. It is evident that in the gift of the use and occupancy of the property the testator had the same design and sought to effect the same object. It may be remarked that this court will sometimes control the extinguishment of such a power. In *Longbridge v. Thorne*, reported in a note in 1 Russ. & Myl. 481, where a father, having a fund for life with remainder to his children in such shares as he should appoint, and in default of appointment to the children equally, made a release of the power for the purpose of vesting in himself the share of a child who had died, and whose executor and legatee he was, the court refused to give present effect to the release so far as it operated to vest such share in him, although the power was, in fact, extinguished by the release. And as a general proposition, if the duty of the donee requires him to exercise a power at a future time, he cannot extinguish it by a release. *Williams on Real Prop.* 256.

This case differs essentially from one where the gift is of a life estate, with a power to the life tenant to compel a sale by

Pierson v. Hitchner.

his direction or appointment. There, the life tenant moves the arm of the trustee at his will and for his own advantage. Here, the sale rests in the discretion of the trustees, qualified only by the necessity of obtaining the consent of the life tenant to the exercise of that discretion. The power of sale is in them, not in him. However much he may desire a sale, it cannot be had except at their discretion.

To grant the prayer of this bill would be to defeat the manifest intention of the testator, as well by depriving Charles and his family of all use and occupation of the property, during his lifetime, and so of all benefit of the devise during his life, as by depriving the executors of the power conferred by the testator for the protection of the subject of his bounty, and to secure it to its appropriate objects; and it would be to deprive those in remainder, as well as Charles, of the benefit of the exercise of that power.

The judgment creditor has obtained a lien on such estate, and only on such estate, as well as to tenure as otherwise, as by the provisions of the will has been created. If the estate be uncertain, he has no equity to call on this court to add certainty to it. If its tenure be weak, he has no equity to call on this court to strengthen it.

If, as before remarked, the power to consent is extinguished by the judgment, then no relief is needed in the premises. If it be not so extinguished, there is no case made by the bill to induce this court to exercise its power, under the circumstances, to prevent a sale by the executors.

The injunction will be dissolved and the bill dismissed, with costs.

PIERSON and others vs. HITCHNER and others.

1. Notice of application for assignment of dower, by publication, where all the persons interested in the lands reside in this state, is a nullity, and assignment of dower to a widow under proceedings had upon such notice, is illegal.

 Pierson v. Hitchner.

2. Minors who have no guardians, are entitled to notice of such application, and guardians *ad litem* should be appointed for them.

3. The Court of Chancery has power to set aside an excessive assignment of dower. It has undoubted jurisdiction over the whole subject, and is competent to administer the appropriate relief on equitable terms.

4. The widow having married again, and her husband having made improvements on that part of the lands assigned to the widow, at the request of the parties seeking to set the assignment aside, he is entitled to compensation therefor, and he and his wife must account, as trustees, to the husband for the reasonable annual value during the time they have enjoyed it, of the excess which may appear of the dower as assigned, beyond the proportion which may be ascertained upon a re-admeasurement.

Bill for injunction, and to set aside assignment of dower.
On final hearing on pleadings and proofs.

Mr. F. F. Westcott, for complainants.

Mr. J. J. Reeres, for defendants.

THE CHANCELLOR.

Philip Pierson, late of the county of Cumberland, in the State of New Jersey, died on the 21st of July, 1853, intestate, leaving a widow and five minor children, the youngest of whom was then but two years old, and the oldest but eleven years of age, all his heirs-at-law. One of the children has since died, and another seems, from the evidence, to be *non compos mentis*. At the time of Philip Pierson's death, he owned a farm of about one hundred acres, lying partly in Cumberland and partly in the county of Salem. The widow, having in May, 1854, married Eliza Hitchner, applied with him to the Ordinary, on the 5th of July of that year, by petition, for the assignment of dower, under the "act relative to dower." The petition alleged that the petitioner had caused at least four weeks' notice of the application to be given to all persons interested in the real estate, by publication in the *West Jersey Pioneer*, a newspaper printed and published at Bridgeton, in Cumberland county, and circulating in the neighborhood of the prop-

Pierson v. Hitchner.

It does not appear from the petition, nor otherwise in the proceedings, who the persons interested were. On the filing of the petition, commissioners were appointed to assign the dower, who accordingly set off to the widow, forty acres of the farm, including that part on which were the dwelling-house and all the rest of the farm buildings. Their report is dated October 20th, 1854. Eli P. Hitchner took out letters of guardianship of the persons and estates of the children, in September, 1854. On his marriage to Mrs. Pierson, he took possession of the whole farm and remained there, his wards residing with him, till 1861, when he removed to a farm which he owned, in the county of Salem, and from that time to 1870 he leased the Pierson farm, or put it out on shares, and received the rent, or a share of the produce of it, accordingly. In 1870, George, Joseph, and Margaret, three of the complainants, children of Philip Pierson, were let into possession of the whole farm, by Eli P. Hitchner and his wife, and were so in possession in December, 1872, with Gould S. Hitchner, with whom Margaret had intermarried. At that time, notice to quit the farm on the 25th of the ensuing March, was given to them by Eli P. Hitchner and his wife. The complainants, in February, 1873, filed their bill for an injunction to restrain Eli P. Hitchner and his wife from evicting them from the premises, and to set aside the assignment of dower.

The assignment to the widow was illegal. The act under which the proceedings were taken, (*Nix. Dig.* 252, 253,) provides that it shall be lawful for any widow, entitled to dower in any lands or real estate of which her husband died seized, or for any heir or heirs, or guardian of any minor child or children, entitled to any estate in such lands or real estate, or for any purchaser thereof, to apply, by petition, to the Orphans Court of the county where the said lands or real estate are situated, for the appointment of commissioners to assign to such widow her dower in such lands and real estate, and that thereupon the court shall appoint three discreet and disinterested freeholders, in the county, commissioners to admeasure and set off, as speedily as conveniently may be,

Person v. Hinchey.

one-third part of the lands and real estate, as the widow's dower. It further provides, that the party petitioning shall give twenty days' previous notice in writing, to the other person or persons interested and to the guardians (if any) of minor children, of the intended application, by serving the same personally, or leaving it at his or her usual place of dwelling: or where any person entitled to notice of such intended application shall not reside in this state, and shall not be served with notice as aforesaid, then notice may be given by advertisement in a newspaper published in the county where the said lands or real estate are situated, or in the county nearest thereto in which a newspaper shall be published, for at least four weeks successively, at least once in each week. It is further provided, that where a husband shall die seized of lands or real estate in two or more counties, it shall be lawful for the Ordinary or Surrogate-General to appoint commissioners to admeasure and set off dower as aforesaid, and to proceed therein in all respects as the Orphans Courts are by that act authorized to proceed for the making admeasurements of dower. The statute provides for notice to all persons interested. Those who reside in this state are to be notified by written notice, served personally, or left at their usual place of dwelling. The notice by publication is authorized only in the case of non-residence. In this case, all of the persons interested resided in this state. The notice by publication was therefore, a nullity. The minors, however, when the petition was filed, had as yet no guardian, and it is urged by defendants' counsel, that therefore no notice was requisite: that the act makes it obligatory on the petitioner to give notice only to such minors as may at the time have guardians. Such a construction is inadmissible and unreasonable. The legislature intended and provided that all persons interested should have notice, either actual or constructive. Minors are to have notice in the person of their guardians, if any they have. If they have no guardians, they are not, therefore, to be ignored. A minor may, of course, be of such an age and of such intelligence, as to be

Pierson v. Hitchner.

quite able, if not to protect, still, to look after his interest in such a proceeding; and, as a rule, notice should be given to minors residing in this state, without guardians, in the manner designated by the statute. The fact of their minority should be made to appear to the court, to the end that it may appoint guardians *ad litem* for them. If the circumstances of the minor, such as his tender age, want of capacity, or the fact that he is under the care of the applicant, be such as to render notification impracticable or nugatory, the fact of non-notification, with the reason thereof, should be made to appear. The legislature, of course, did not intend that the rights of the infant who has a guardian to look after his interest, should be carefully protected, while those of the minor who has no guardian, and therefore most needs protection, should be wholly ignored.

In a writ of dower, or dower *unde nihil habet*, the court provides, by the means usual in courts of law where a minor is defendant, for the protection of the rights of the infant heir. In equity, the assignment of dower is made with like care as in a court of law, for the rights of the infant who may be interested. But, under the construction contended for under the summary proceedings provided by the act, the interest of the infant who happens to be without guardian, is entirely uncared for. In the present case, all the persons interested, except the petitioners, were infants of tender years, and the proceedings are not only silent as to the fact of their minority, but do not even disclose who the persons interested were. It was, in fact, an *ex parte* assignment, without notice to any person interested. Again, the assignment was clearly excessive. Of the one hundred acres of which the farm consisted, forty, with all the farm buildings, were assigned to the widow. Nor does there appear to have been any reason for the apparent excess. Of the power of this court to set aside the assignment, there can be no doubt. In *Hoby v. Hoby*, 1 Vern. 218, the bill was, to be relieved against an assignment of dower by the sheriff, which, in the bill, was charged to have been fraudulently

Pierson v. Hitchner.

made, there having been assigned to the widow for her dower, one full third part, in annual value, of the lands, and, on the third, there was a coal mine of considerable annual value, which was not taken into account in the assignment. In view of this fact, and that the widow's father was the only person who defended the writ of dower on behalf of the infants, and appeared to see it set out, (which, to the court, seemed like collusion,) the court proposed terms in reduction of the assignment to the widow for her consideration and acceptance, and directed that a new assignment be made, if she refused them. In *Sneyd v. Sneyd*, 1 *Atk.* 442, the widow had recovered judgment in a writ of dower, and dower was assigned by the sheriff. The heir filed the bill to be relieved against the assignment, on the ground that the sheriff had included in his estimation of the property of which the widow was dowable, property in which she was not entitled to dower, and had assigned to her, accordingly. The assignment was, therefore, excessive. The court ordered that it be set aside. This court has undoubted jurisdiction over the whole subject, and is competent to administer the appropriate relief on equitable terms. *Hartshorne v. Hartshorne*, 1 *Green's Ch.* 349; *Hinchman v. Stiles*, 1 *Stockt.* 454; *Opdyke v. Bartles*, 3 *Stockt.* 133; *Rockwell v. Morgan*, 2 *Beas.* 119.

And there is special reason why this court should administer the relief. This case should be disposed of in all its parts, here. It appears that, since the complainants have been in the occupation of the premises, Eli P. Hitchner has, at their request, built a new barn on the property, locating it on that part of the farm assigned to the widow. He is entitled to compensation for it. Besides, he and his wife should account, as trustees, to the heirs for the reasonable annual value, during the time they have enjoyed it, of any excess which may appear of the dower as assigned, beyond the proper quantity which may be ascertained upon the re-admeasurement. The assignment made by the commissioners will be set aside, and a new one made under the direction of this

Hecht v. Koegel.

court. When it shall have been made, it will appear as to what excess Eli P. Hitchner and his wife are to account, and the account may then be taken between the parties.

HECHT vs. KOEGEL and KOEGEL.

Creditor's bill to set aside a conveyance by the debtor, on the ground that the conveyance was made without consideration, and to defeat creditors. Decree accordingly.

On final hearing on pleadings and proofs.

Mr. J. H. Lippincott, for complainant.

Mr. J. F. Randolph, for Christian Koegel.

THE CHANCELLOR.

This is a creditor's bill. The complainant alleges that the defendant, Gottlob Koegel, being indebted to him in the sum of about \$350, for goods sold and delivered between January, 1870, and April 21st, 1871, conveyed to his brother, the defendant, Christian Koegel, all his property, personal and real, with intent to hinder and defeat his creditors. The complainant recovered a judgment for his claim in the Circuit Court of Hudson county, on the 26th of December, 1871, and issued execution thereon, which was levied on the hereinafter mentioned land. The proof shows that about the 1st of August, 1871, Gottlob was the owner of a dwelling-house, in which he lived, and which was upon a tract of four lots of land belonging to him, at West New York, in the county of Hudson, and of valuable personal property, which he had in his possession there, consisting of horses, wagons, cows, swine, &c., &c. He was indebted to various persons to the amount in the aggregate of about \$1500, but

Hecht v. Koegel.

was unable to meet his obligations. He was in trouble. He had an encounter with a person in New York, which resulted (but without his fault, it appears,) in the death of his assailant, and he had met with considerable losses in his business. By the advice of his brother Christian he absconded from his creditors, and thereupon Christian took possession of his personal property, removing it from the premises of Gottlob by night. Just before he absconded he executed a mortgage on his real estate before mentioned, to Christian, for \$1500 which was ante-dated April 1st, 1871. An attachment having been issued against Gottlob by a creditor named Klein, and levied on the personal property, Christian paid the claim and removed the attachment. Part of this property Christian sold, and the rest of it he returned to Gottlob on the latter's return to this state, which took place about the 15th of the same month of August. Gottlob then executed a bill of sale to Christian for part of the personal property for the consideration, as expressed in the instrument, of \$700 and with his wife executed a deed of conveyance to Christian for the real estate: the consideration expressed in the deed being \$2600. That property was subject to a mortgage given by Gottlob, April 1st, 1870, to Henry F. Maack for \$1000, and interest. The complainant alleges that the conveyance of the real and personal property to Christian was without consideration, and to defeat creditors. Gottlob swears that it was so, that it was made at the suggestion of Christian, who proposed to hold the property until a settlement could be effected with the creditors, and that the mortgage of \$1500 was given to enable Christian to make settlement with the proceeds of it. Gottlob states, that on his return, Christian proposed the conveyance of the real estate and the execution of the bill of sale, in view of Christian's inability to manage his affairs, and that he executed the bill of sale and deed for the land to Christian, according to Christian's request. Christian, on the other hand, swears that the mortgage was given to him to secure a debt due to him from Gottlob, and that the money advanced by him to Gottlob at various times

Hecht v. Koegel.

number of years, from the time when Gottlob first arrived in this country, and that the bill of sale and the conveyance of the land were made on a sale of the property by Gottlob to him, made in view of Gottlob's intention to return to Europe. He testifies that he was to pay the money for the goods, and that the consideration of the deed was made up of the Maackens mortgage of \$1000, his mortgage of \$1500, and the amount of a note for \$100, endorsed by him for Gottlob. He utterly repudiates the idea that he took the property, real or personal, or any of it, on the understanding that he was to pay the debts of Gottlob, or any of them, and distinctly and expressly swears that he made no such agreement, and that there was no such understanding. Opposed to this statement, is not only the evidence of Gottlob, but also that of his wife, who testifies that when Christian was taking the personal property away, she was weeping, and he, to quiet her, told her that in four or five days he would bring the property all back to her, when he should have settled up with the creditors. And in this she is corroborated by two disinterested witnesses; one of whom says that on another occasion Christian made a like statement to her in his presence, and added, that his brother should not lose a penny on his account. The complainant also swears to Christian's admission to him that the personal property had only been transferred to him to make an easy settlement with Gottlob's creditors, and that it was still Gottlob's; and that the mortgage of \$1500 was made so that Gottlob's creditors could not attach the property, and so Gottlob would be safe. One of Christian's witnesses, William Kraft, testifies that about a week after Christian took possession of the personal property, Christian and Gottlob came to his house to sell him a wagon, part of the property, and that he bought the wagon and gave a note for it, payable to Christian's order, which the latter handed over to Gottlob, and that he made the note to Christian's order because Gottlob said Christian "had the things to sell." Besides all this, Christian is contradicted by his answer in the cause, in which, after stating that the consider-

Hecht v. Kegel.

ation of the bill of sale and deed was the mortgage of \$1500, and \$100 money lent by him to Gottlob, he adds, that he, "as a further consideration for said deed and bill of sale, agreed and assumed to pay, and did pay with his own money, certain debts then due and owing by Gottlob to various persons, amounting, together, to the sum of \$1150, or thereabouts." And he further "insists" that the bill of sale was "executed and delivered to him in consideration of certain debts of Gottlob, at that time paid or assumed by him." It appears from the evidence, it may be observed, that the debts he has paid amount to but little if anything more than the amount received by him from the sale of the personal property sold by him. To establish the debt of \$1500, he swears that on the 5th of January, 1871, he and Gottlob had a settlement, in which the latter was found to owe him for borrowed money, and interest, \$1500, including \$75, which he says he then lent to Gottlob. But he fails to give a credible account of this alleged settlement, and Gottlob denies it *in toto*. Christian produces a written statement acknowledging the accounting, and that there was found due to Christian from Gottlob thereon, \$1500, the signature to which the latter admits is genuine, but he denies that he signed that instrument. An inspection of the document is sufficient to show that the signature and the statement were written at different times. They are in different inks. The signature may have been given to Christian in blank for the purposes of the fraud they intended. At all events it seems clear, that if the genuineness of the instrument be admitted, it was fictitious and intended merely to further the fraudulent design of Christian and Gottlob. The former is unable to account for the fact, that the amount of the alleged indebtedness, including interest, was exactly \$1500. He cannot state the items of the alleged loans beyond the amount of \$875, and these are, as is the whole of the alleged indebtedness, expressly and explicitly denied by Gottlob. Christian's account of the loss of his memorandum-book, in which, he says, he had set down the loans, is unworthy of credit.

McKillopp v. Taylor.

My conclusion is, that the bill of sale and deed were both voluntary, and were made with intent to hinder and defeat the creditors of Gottlob, and ought to be set aside as fraudulent.

McKILLOPP vs. TAYLOR.

A party enjoined, violates the plain and positive mandate of the court at his peril. Advice of counsel, that he may safely pursue the course prohibited, without conforming to limitations prescribed by the injunction, will not avail to excuse his misconduct.

On motion for attachment for contempt.

THE CHANCELLOR.

The defendant is the occupant of the premises known as "The Idle Hour," at Greenville, in the county of Hudson, on which he has established a rifle-range, for the accommodation of shooting parties. The complainant occupies, under lease from him, the adjoining land, on which he dwells with his family, and which he cultivates as a market garden. At the filing of the bill, the range was in frequent use, and rifle balls, discharged by persons shooting there, passed over the complainant's premises, and some of them fell upon them, causing great and constant apprehension of personal injury in the complainant and his family and workmen employed there on his grounds. The bill prayed an injunction against the defendant, and the writ was granted, restraining him from the use of the range until it should have been rendered free from danger to the complainant, his family, and workmen. The defendant, after the injunction was served, permitted the range to be used, without taking any steps whatever to render the use of it less dangerous. Motion is now made for an attachment against him, as for contempt for violation of the injunction. He alleges, that before permitting the range to be used, after service of the injunction, he consulted counsel,

Vreeland v. New Jersey Stone Co.

who, he alleges, examined the range and advised him that might safely continue to use it, without taking any further steps to protect the complainant. If such advice was, indeed given to him, it cannot avail him as an excuse for his misconduct. He needed no advice on that point. The terms of the writ were plain and positive, and he disobeyed the mandate of the court at his peril. He must be adjudged to be in contempt. It appears that he has made some attempts since then to render the range free from danger to the complainant and he insists that he has been successful, but the evidence shows that the nuisance still continues. The injunction will be modified so as to prohibit the use of the range until it shall be made to appear to the court that it is free from danger to the complainant, his family, and workmen.

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VREELAND vs. THE NEW JERSEY STONE COMPANY
and others.

1. An answer must answer fully all the material allegations and charges in the bill, and all the interrogatories founded upon and incidental to them. This rule is strictly adhered to in cases of fraud.

2. The insufficiency of the answer in important particulars, is sufficient ground for refusing to dissolve an injunction, granted upon filing the bill.

3. An injunction will not be dissolved upon new matter set up in the answer, not responsive to the bill.

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On exceptions to master's report, and motion to dissolve injunction.

Mr. Isaac S. Taylor, for complainant.

Mr. Jacob Weart, for defendants.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendant the New Jersey Stone Company, from declaring the stock held by the complainant in that company, forfeited for non-

Vreeland v. New Jersey Stone Co.

payment of an installment of five per cent. for which the directors have called. The complainant asks the relief on the ground of fraud. The company was incorporated by a special act of the legislature of this state. The amount of its capital is \$100,000, divided into one thousand shares, of which each of the five directors, except James H. Startup, owns one hundred, and he owns two hundred. The stock held by the directors, with that held by Anness, one hundred shares, and that held by the complainant, is all that has been taken or subscribed. All the stockholders, other than the complainant, are, with the company, defendants. The complainant alleges in substance, that a call for fifty-two and a half dollars per share, made in May, 1872, and which he paid, was fraudulently designed by the other stockholders, five of whom are the directors, to affect and to obtain money from him alone, and that none of the rest of the stockholders have paid anything into the company, but that the other stockholders have conspired to defraud him by means of the calls, on the pretence that the company has purchased from Startup, a lease for a certain quarry in Ulster county, New York, at the price or premium of \$35,000, and has paid for it in cash. The complainant charges that it has made no such purchase and that if it has, it is a gross fraud on him ; that the alleged price is an enormous one for the lease, which was made January 1st, 1873, to Startup for a term of nine years and three months from that date, reserving a rent of only \$1500 for the whole term.

The defendants answered. Exceptions were filed to the answer. They were referred to a master who has reported, sustaining them. To his report the defendants excepted.

The first exception to the answer is, that the lease, a copy whereof is attached to the bill, is not admitted or denied. This exception is well taken. The complainant has a right to an answer on this point, but there is none whatever.

The second exception is also well taken. That part of the bill to which it relates, charges combination and conspiracy among the individual defendants, to give themselves a ficti-

Vreeland v. New Jersey Stone Co.

tious and fraudulent credit on their stock, by reckoning an ~~and~~ allowing to Startup \$35,000, as the value of the lease, an ~~d~~ applying the amount to the payment of the installment ~~of~~ fifty-two and a-half dollars per share on his and their stock. This is not answered. The charge is of a particular combination. A particular answer must be given. The general denial will not do. *Story's Eq. Pl.*, § 806.

The third exception must also be allowed. The bill alleges that when the installment of fifty-two and a-half per cent. was called for, the complainant was assured by the directors, and it was understood between him and them, that the like installment had been called for and demanded from all the subscribers to the stock of the company, upon the whole amount of the subscriptions, and that all of them, except him, had already paid it in full. It charges that the installment had not been paid by any other stockholder, and the interrogatory calls for an answer as to how, and to what extent and amount, the assessments upon the respective subscriptions of the other stockholders have been paid. The answer on this point simply says, that the defendants "deny that said assessment had not been paid by the other stockholders, but (say) that each one of the other stockholders had paid up their fifty-two and one-half per cent. subscription." This is entirely insufficient.

The fourth exception must be sustained. The bill calls on the company in its interrogatories, which are based on sufficient statements, for a disclosure and discovery of its title to the lands on which its operations are conducted, with the true consideration paid or agreed to be paid therefor, and the manner and time of such payment made or agreed to be made, and to whom the same was or is to be paid, and also, the true consideration of any and all conveyances, leases, contracts, assignments or agreements under which the lands or any interest, rights or privileges therein, are held and enjoyed by the company, and to whom, when and in what manner such consideration was paid or is to be paid. The answer is in this respect evasive and insufficient.

Vreeland v. New Jersey Stone Co.

The fifth exception has reference to the call in the bill upon the company, for an account of all moneys received from assessments on the subscriptions to the stock and the full amount of the earnings of the company from the commencement of its operations to the present time. The bill alleges a refusal on the part of the officers of the company to furnish the information to the complainant, in regard to the moneys or equivalents thereof, received in payment of the installments or assessments on the stock. The answer on this point merely says, that the accounts and expenditures are open to the examination of the complainant at any time, and refers to a trial balance sheet annexed to the answer. This exception, so far as the moneys received from assessments is concerned, must be allowed. The balance sheet is in no sense such an account of those moneys as the defendants are bound to give. The only statement on that score which it contains, is "capital stock paid in, \$44,463.42." They could readily have given the amounts received from each of the seven stockholders, on account of the two calls which have been made, and they were bound to do so.

Having undertaken to answer the bill, they must, according to the general rule, answer fully all the allegations and charges in it, and all the interrogatories founded upon and incidental to them. *Story's Eq. Pl.*, § 605; *Hogencamp v. Ackerman*, 2 Stockt. 267; *Brown v. Fuller*, 2 Beas. 271. This rule is strictly adhered to in cases of fraud. *Mech. Bank v. Levy*, 1 Edw. 316; *Soull v. Reeves*, 2 Green's Ch. 84; *Smith v. Loomis*, 1 Halst. Ch. 60. The master's report must be confirmed, the exceptions sustained, and the answer adjudged insufficient. ✓

The motion to dissolve the injunction must be denied. The insufficiency of the answer, in the important particulars which form the basis of the exceptions, is reason enough for denying the motion. *Mervin v. Smith*, 1 Green's Ch. 182; *Soull v. Reeves*, 2 Green's Ch. 84; *Everly v. Rice*, 3 Green's Ch. 553; *Teasey v. Baker*, 4 C. E. Green 61. The ground on which the motion was placed, was that of estoppel, that the

 Douglas v. Merceles.

complainant, when he subscribed for and took his stock, had full knowledge of the transaction of which he now complains. The complainant, by his affidavit read on the hearing, denies the imputed notice. He subscribed for his stock about the 25th of May, 1872. The lease from Terwilliger to Startup, appears not to have been made until January 1st, 1873—seven months afterwards. It does not appear when the assignment from Startup to the company was made. The answer is silent on this point, though it states it was recorded June 5th, 1873, which was three months after the filing of the bill. The lease to Startup, therefore, was not made until three months after the complainant's note for \$5250, given for the first installment, was paid. The resolution, of which it is alleged in the answer the complainant had notice, but which notice he denies, authorized the president and secretary of the company to "purchase the lease of lands owned by James H. Startup, at an expense of \$35,000, the said lands consisting of two hundred acres, more or less, and situated at Port Benjamin, Ulster county, state of New York." At that time, May 9th, 1872, Startup had no lease for the premises. It is said in the answer, indeed, but only indirectly, however, that he had a contract for it at that time. It is, obviously, impossible to determine the merits of the controversy at this stage of the suit. Apart from these considerations bearing upon the merits, the rule forbids a dissolution based on this new matter, not responsive to the bill, especially in view of the complainant's denial. *Brewster v. City of Newark*, 3 Stockt. 114; *Morris Canal and Banking Co. v. Jersey City*, 1 Beas. 227; *Green v. Pallas*, 1 Beas. 267; *Huffman v. Hammer*, 2 C. E. Green 263.

 DOUGLAS vs. MERCELES and others.

1. The market value of stock is the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may

Douglas v. Merceles.

before or after the day, and for that inquiry, a reasonable of time is allowable.

reference to ascertain the market price of a certain stock on the intrinsic value of the stock should not enter into the case there has been no market price within a reasonable period, or after that day.

material, in ascertaining such value, to inquire why the stock was not in the market, when it was not thrown on the market in the case, and there is no reason to doubt that the seller obtained the best price he could for it.

objections to master's report.

Attorney and Mr. Griggs, for exceptants.

W. Woodruff, for complainant.

CHANCELLOR.

Order made in this cause, on the 31st of March, 1874, referring to a master, to ascertain what the market value of one share, of the stock of the Riverside Land Improvement Company, on the 1st day of November, 1867, would be equal to the number of shares of stock of that company, of the par value, \$50 per share, would be equal to the fifth part of \$22,500 and interest thereon, from August 28th, 1866, to November 1st, 1867, and what the value of such shares would have been at that market value, ascertained, on the last named day, and the amount of such value of those shares, together with the interest thereon to the day on which the master should make his report. The master having reported, exception was filed to his report as relates to the market value of the stock. The reports state that that value was, on the 1st of November, 1867, \$211.30 per share, and gives as his reasons for this that the evidence shows that, on the day last mentioned, the stock was not in the market; that the company had three thousand one hundred and eighty lots of stock, each share of stock represented two and sixty-seven hundredths and twenty-fifths lots; that each acre of land

Douglas v. Merceles.

then owned by the company, contained twelve lots, and worth \$1000, at an average valuation, and that each lot therefore worth \$83.33.

Finding that the stock was not in the market on the day as of which the market value was to be fixed, he has found and reported what he considers to have been its intrinsic value. The market value and the intrinsic value are, in many means, necessarily the same; the terms are not convertible. The intrinsic value of a stock is not only not an infallible guide to its price in the market, but is, in fact, no guide at all. A stock intrinsically worthless, may bring a good price while, on the other hand, one of great intrinsic value, may be greatly depreciated. If, under such a reference as that in the order in consideration, the master should find no guide to which he could reasonably commit his conclusions—if he should find no market price within a reasonable period, either before or after the day to which his inquiries are to be directed, the intrinsic value may then enter into his estimate. But the order in this case called for his report as to the market value, a term deliberately employed as being exactly expressive of the meaning of the court. And if a marketable value could be established, the master was bound to find and report it. The late Chancellor found no fraud in the conduct of the owners of the four and a-half shares of the original association. The language is (*Douglas v. Merceles*, 8 C. E. Green 335 :) “The bait of the profits was held out by the others, but Douglas did not believe in any profits; he had lost confidence in speculation, and, like a prudent man, was not willing to make himself liable for more than he was already liable for. He rightly apprehended what the others did not see—that, if the scheme was a failure, he would be liable for losses in proportion to his interest. I can see no fraud practised upon him by the others. He was, perhaps, over cautious—at all events as it turned out, those that had faith in it were right. He cannot protect himself by his over-cautiousness, and cannot ask for a share of the profits of his less prudent associates, who were to run the risk, and who have made the profits.”

Douglas v. Merceles.

am of opinion that the complainant is not, by the agreement, entitled to any part of these four and a-half shares in the original association." He held, however, that those who took those shares, ought to have paid for them with their own funds; but, instead of that, they paid for them in the funds of the association, and therefore with money of which the complainant was entitled to one-twenty-fifth part, for which part they are bound to account to him in the stock of the company, at its "real market value" at the time of the conveyance, the 1st of November, 1867. The company dissolved on the 17th of July, 1872. Its dissolution had taken place, and its assets had been divided among its stockholders, when the opinion above quoted was delivered. The order contemplated, therefore, that payment was to be made in money, instead of stock. The intention of the court was, to require the owners of those shares to account to the complainant for the one twenty-fifth part of the moneys of the association, taken to pay for those four and a-half shares, with interest, as in the stock of the company at its current value in the market on the 1st day of November, 1867.

The market price of a commodity is the actual price at which it is commonly sold. That price may be fixed by sales in market at or about the time. If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry, a reasonable range in point of time is allowable. *Dana v. Fiedler*, 12 N. Y. 40; *Beach v. Raritan and Del. Bay R. R. Co.*, 37 N. Y. 457. There had been no sales before this date. There were none at that time; but there were some after it. It appears that, from the 1st of November, 1867, until December, 1870, the value of the stock in the market did not materially fluctuate. There is, therefore, no injustice to the complainant in taking the market prices between those dates as a criterion. And in taking this range, he has the benefit of some, at least, of the improvements put upon the property, and advantages secured for it by the company, after November 1st, 1867. After that date, an encumbrance was removed

Douglas v. Merceles.

and improvements were made and induced by the company, at very considerable expense, which must have enhanced the value of the stock. The encumbrance was a lease, having eleven years to run, upon between sixty and seventy of the three hundred and fifty acres owned by the company, for the surrender of which the company paid \$6000. The improvements appear to have been, the location, building, and completion of the New Jersey Midland Railway through the property, the location by the railway company on the land of the land company of a depot at a convenient place selected by the latter, the building and operating of the Paterson and Little Falls horse railway through the property to the centre of Paterson, and the building of a number of dwelling-houses and the grading of the streets. On the 18th of February, 1868, the first sale of the stock appears to have been made. Then, twenty shares were sold at \$100 per share, and though there were two sales of forty shares each, on the 1st of November, 1868, and one on the 10th of that month, of thirty shares, and another on the same day of twenty shares, and a sale of twenty shares on the 10th of September, 1869, yet at none of these sales, nor at all up to December 28th, 1870, did the stock bring more than \$100 per share; and on the last named day, forty or fifty shares were sold at \$140. The sale made in February, 1868, followed, as it was, by other sales, made in that year and in the two years and ten months following, none of which were at a greater price, may properly be regarded as fixing the marketable value of the stock as not exceeding \$100 per share on the 1st of November, 1867. These sales were in the aggregate of one hundred and seventy shares. The quantities sold at the various sales were moderate, and the sales took place in Paterson, where the company and its property were located and its operations conducted. I leave out of view the opinion expressed by Mr. Hobart, the person who purchased the stock sold in February, 1868, that the stock, on the 1st of November, 1867, would not have brought more than \$75 a share, because it is merely an opinion. The question to be deter-

Douglas v. Merceles.

and is, what could the complainant, if he had owned the stock and had been willing to sell it, have got for it in the market, on the last named day, from a person willing to buy? What price would he have been compelled to pay for it? It is not to be forgotten that the enterprise was a speculation. Had it proved a failure after the 1st of December, 1870, the complainant would, under the evidence, have been entitled, in this account, to have had the market value of the stock on the 1st of November, 1867, fixed at \$100 a share. The fact that the stock increased in value in the market after the 1st of December, 1870, and the speculation proved a success, cannot fairly or legitimately affect the conclusion as to its market value on the 1st of November, 1867. It is urged, however, on the part of the complainant, that the sales form no criterion of the market value of the stock, because the vendors were under some necessity to part with their stock, and were therefore not in a condition to insist on a high price. This allegation is not supported by the evidence. Besides, it does not seem to be material, in ascertaining the market price of the stock, to enquire why the stock appeared in the market. It was not thrown on the market in large quantities. The sellers, it is to be presumed, obtained the best price they could for it. That the stock did not command a better price in the market than \$100 a share, at the time when these sales were made, is not denied.

The master should, under the evidence, have found that the sum was the market value of the stock on the 1st of November, 1867. The exceptions, therefore, are sustained. The interest on the market value of the stock, from November 1st, 1867, to October 21st, 1873, the date of the master's report, is \$809.66. The master, therefore, should have reported that the amount of the market value of the shares, with the interest thereon, was \$2746.75.

Gardner's Administrator v. Schooley.

GARDNER'S ADMINISTRATOR vs. SCHOOLEY and others.

1. A mere promise by a father to reward a daughter for her faithful discharge of her filial duties, in the absence of any contract or legal obligation on which an implied promise to pay her can be based, is not such an agreement as will support a mortgage subsequently executed to her, against the father's creditors.

2. The law will not imply a promise on the part of a parent to pay a daughter for services rendered by her in his household.

On final hearing, bill and cross-bill, answers, replications and proofs.

Mr. John T. Bird, for complainant.

Mr. E. P. Conklin, for defendant, John J. Creveling.

Mr. M. Wyckoff, for Sarah A. Schooley.

THE CHANCELLOR.

The bill is filed to foreclose two mortgages, held by the complainant, and given by Jediah Schooley, late of Bloomsbury, in the county of Hunterdon, now deceased, on a house and lot there, owned by him. The first was given to Henry Gardner and William S. Gardner, on the 21st of March, 1869, to secure the payment of \$185.20, and by them it was assigned to the complainants' intestate. The second was given on the 1st of April, 1871, to the complainant's intestate to secure the payment of \$120. The property was, at the time of executing the first of these mortgages, subject to a mortgage given by Jediah Schooley to William Creveling for \$1000, and interest. After giving the first of the complainant's mortgages, Jediah Schooley executed a mortgage, dated December 28th, 1869, on the property for \$1000 and interest, to his daughter, Sarah A. Schooley, and on the 6th of April, 1870, he

Gardner's Administrator v. Schooley.

executed another mortgage for \$246, to Robinson and Hoff, who assigned it to John J. Creveling, by whom it is now held. All these mortgages are still subsisting.

The controversy between the parties, relates only to the mortgage of Sarah A. Schooley, which the complainant and John J. Creveling (the latter of whom filed a cross-bill attacking it,) insist was voluntary and designed to hinder and defeat the creditors of Jediah Schooley. Her answer, which is under oath according to the requirement of the bill, alleges that it was given to secure an indebtedness of \$1000, from her father to her for her work, labor, care, diligence and nursing for him, and for money by her lent and advanced to, and paid out and expended for him. It appears, however, from her testimony in the cause, that the mortgage was not given in consideration of any money lent or paid, but only, as she alleges, for her services in taking care of her father's house, rendered between 1858 or early in 1859, and the date of the mortgage. She testifies, that in 1858, she, being then about eighteen years old, went away from her home in Bloomsbury to learn a trade; that she remained away about three months, when her mother's illness made it necessary that she should return home to take charge of the affairs of the household; and that she returned accordingly and thenceforward remained at home, devoting her time and services to the family, taking charge of the household, washing, ironing, mending, &c. Her mother died in March, 1863. Her father was a day laborer, working on the railroad and dependent on his labor for his support. He was possessed of no property, except the mortgaged premises, a house and lot of one quarter of an acre, and some household goods, but not enough, however, to furnish his house, the best part of the furniture in the house having been provided by some of his sons, who lived with him as part of the family. After the death of his wife, his family consisted of himself, his mother, and his four sons and two daughters. Three of the sons appear to have been past their majority. They nevertheless lived with their father, making his house their home. They paid no board,

Gardner's Administrator v. Schooley.

nor did they make any compensation for their washing, mending, &c., which were done by Sarah, there, but retained their earnings for their own use. Her services were to an inconsiderable extent rendered to them. Two of them, with her father, furnished her clothing. She continued from the time of her return in 1858 or 1859, thus to live in the family until after her mortgage was given.

The debts of the complainant and that of the defendant John J. Creveling, were contracted for groceries and other necessities, furnished for use in the family, the purchases having been made by Sarah herself. The credit was given to her father. The proof of the consideration of the mortgage to Sarah, is by no means such as to establish the mortgage as against the creditors of her father. On the other hand, it leads to the conclusion that that instrument was without consideration, and was designed to hinder and defraud his creditors. She neither proves nor alleges that there was any agreement for compensation between her and him until within about a year before the execution of the mortgage, and what she refers to in that connection appears to be a promise, that if his life was spared he would give her something to show for her services. This promise he is said to have made on an occasion when her eldest brother remarked the course of a conversation in the family, that he had a lot of land which he had bought with his own earnings, to show for his work, and she said she had worked longer than he and had nothing to show for it, and thereupon her father made her the promise above mentioned. Except this there is no evidence of any agreement between her and her father for compensation, and this is not evidence of any such agreement as will support the mortgage against his creditors. It was his promise to reward her, if in his power, for her faithful discharge of her filial duty. She never made any demand for payment, nor did she ever receive anything on account.

There was no contract, and there appears to have been no legal obligation on which an implied promise in this case is based. The mortgage appears to have been made with

Gardner's Administrator v. Schooley.

consultation with her, and without any knowledge on her part of her father's intention to make it. There was no account, nor any reckoning between them. He appears not even to have consulted her as to the amount for which the mortgage should be made. He went to Phillipsburg and had the mortgage drawn there, and there he executed it. When it was delivered she gave no receipt nor any credit for it. After it was delivered to her, however, she seems to have made up an account, (all the entries of which she says she made at one time, and on which no credit is given,) of her wages, from March 5th, 1863, when her mother died, to the 5th of December, 1869, at \$2.75 per week, with interest for one year on \$852, the gross amount of these wages, according to her account, up to March 5th, 1869. Why this account was thus made up, she seems unable to explain. In the book which contains it, and which she produced on her examination, there is another account of her services, in which her wages are charged at \$2.75 a week up to March 5th, 1866, and after that at \$3 a week, and her father is credited with cash, \$35, under date of March 5th, 1864, and \$42, under date of March 5th, 1865. She says she had no knowledge of the existence of this account until she produced the book on her examination, and that she does not know what the entries in it were intended for, unless it was that one of her brothers intended by them to make out a bill for her. She admits that the credits in that account are fictitious. This book proves to be the pass-book of her father's dealings with Robinson and Hoff, containing the items of her purchases of groceries and like necessities from them, for the amount of which their mortgage, now held by John J. Crevelling, was given, and all of which was due when her mortgage was made. It may be remarked, that she admitted in her testimony that she knew when she received her mortgage, that there was a debt of like character with that of Robinson and Hoff, due from her father to Theodore Gardner. The account which she thus made up after the mortgage was given to her, amounts, without interest, to only

Hand v. Jacobus.

\$852, while the mortgage was given for \$1000, and it may be observed that in her testimony she says that the consideration of the mortgage was her services alone, making no mention of interest. The evidence leads me to the conclusion that the services rendered by her, were not rendered in pursuance of any contract or agreement between her and her father for compensation therefor. Nor will the law imply any promise to pay for services rendered by a daughter to her father under such circumstances as the case presents. She returned to her father's house while she was yet a minor, to live in and be part of his family, and she so continued, unemancipated, until after her mortgage was given. Her mortgage must be held to have been without consideration, and fraudulent as against creditors. *Ridgway v. English*, 2 Zab. 409; *Updike v. Titus*, 2 Beas. 151; *Coley v. Coley*, 1 McCart. 350; *Updike v. Tenbrook*, 3 Vroom 105; *Prickett v. Prickett's Adm'rs*, 5 C. E. Green 478. It will be postponed in favor of the mortgage held by John J. Creveling, and the mortgage given to Theodore Gardner, for \$120, and interest. The priority of the other mortgages over hers is admitted.

HAND and others vs. JACOBUS and wife.

A principal who has executed a contract for the sale of lands, and authorized an agent to receive an installment of purchase money under the contract, and given the purchaser to understand that the balance was to be paid to such agent, cannot repudiate the agency and refuse to execute the deed, because the agent, to whom the purchaser has paid the whole of the purchase money, is unable to pay it over to the principal.

On final hearing on pleadings and proofs.

Mr. F. A. Demott, for complainants.

Hand v. Jacobus.

THE CHANCELLOR.

This is a suit for specific performance. The case presents but a single question—whether Thomas Decker was the agent of the vendor to receive the purchase money. That there was a sale of the property, which was a house and lot in Pennuannock township, in the county of Morris, by the owner, John Jacobus, to Hannah C. Hand, then the wife of the complainant, Albert Hand, but now deceased, is not disputed. Mrs. Hand died after the filing of the bill, and her children were made parties complainant in her stead. Nor is there any doubt that the price for which the property was sold, was, as stated in the bill, \$500, nor that the terms of the purchase were, that of this sum, \$200 were to be paid at the time of the purchase, which was March 2d, 1866, and the residue in sums following, and that on payment of \$200 on account of the purchase money, the purchaser was to be let into possession. The evidence shows that Mrs. Hand, on payment of the \$200, was let into possession accordingly, and expended a considerable amount of money in fencing the property. That the whole of the purchase money was paid, is not questioned, but the dispute is as to whether Thomas Decker, to whom it was paid, was authorized to receive it for the seller. The proof is, that when the first inquiry was made by Albert Hand, of Jacobus, as to whether he would sell the property, and if so, at what price, the latter told the person (Jonathan Andruss) who made the inquiry of him for Hand, that Decker was his agent, and transacted his business for him, and that to him any one desiring to purchase the property must be sent. Hand resided in Morris county, and Jacobus lived in Newark. Decker was a merchant in the latter place. The evidence shows that when the negotiations for the purchase were made by Hand, the aid of Decker was sought by Jacobus, and they were carried on by Decker, for and in the presence of Jacobus, at Decker's store, in Newark. On that occasion, Jacobus offered to sell the property on the terms above mentioned. Hand declined to close the purchase then, saying that he would think the matter over, and if he

Hand v. Jacobus.

got some money, would come down and see Jacobus; to which the latter replied, that he could come and see Decker about the property, that what Decker had done for him was all right, and that Decker would act as his (Jacobus') agent. Subsequently, on the 2d of March, 1866, Mrs. Hand came to Decker and told him they had concluded to take the property on the terms offered by Jacobus. She then paid him the first payment of \$200, for which he gave her a receipt as agent for Jacobus. He then drew an agreement of sale of the property, on the terms offered by Jacobus, for Hand's acceptance, in the conversation at Decker's store. She signed it and left it with him, in order that he might get Jacobus' signature to it, which he subsequently did. Decker retained the document, but it afterwards came into Jacobus' possession, and was produced by his counsel on the examination. Decker testifies that a day or two after he received the \$200, he informed Jacobus of what he had done, and he fully approved of it, and then promised to come into Decker's place of business and sign the agreement; that soon after, but not on the same day, he called on Decker, at his store, and Decker then read the agreement to him. He expressed his approval of it and signed it. On this latter occasion, Jacobus directed Decker to notify the tenant of the property to quit possession on the 1st of April then next, as he had sold the place to Mrs. Hand. This was done, and the tenant left the property in pursuance of the notification, and Mrs. Hand and her husband entered into possession, accordingly. Decker swears that at one of these interviews, he asked Jacobus if he wanted to use the \$200, which he (Decker) had received from Mrs. Hand, to which Jacobus replied that he did; that he would like to use the money all at once; and thereupon he (Decker) told him to let him have the \$200 until he (Jacobus) should receive the rest of the purchase money, and that he would pay him interest for it, to which Jacobus consented. On the 19th of June following, Mrs. Hand called on Decker, and paid him the balance of the purchase money—\$300—which he received, and gave her a receipt for

Hand v. Jacobus.

as agent of Jacobus, promising to get the deed for the property and send it to her. The deed appears to have been subsequently drawn and executed, but Jacobus refused to deliver it until he received the whole of the purchase money, which Decker was then unable to pay him, but offered to pay a \$200 or \$300 of it in cash, and to give his check or note, payable within a few days from that time, for the residue. Jacobus declined to accept this arrangement of the matter. Jacobus, in his answer, which is wholly unsupported, denies that Decker was his agent, or that he ever held him out to be agent in the sale of the property. Opposed to his denial, however, is the testimony of Andruss and Decker, and that Harris, who was present at the negotiation at Decker's store, and who testifies that in the conversation there, between the parties, Decker said that he was the one who did the business, and that therefore it would not be necessary for Jacobus to be present. To the testimony of these witnesses, is to be added the circumstance, that after full knowledge of the fact that Decker had received the first payment from Mrs. Hand, and receipted for it, Jacobus not only made no objection to Decker's action in the matter, but distinctly approved of it, leaving the money in his hands as a loan on interest, and gave possession of the property to Mrs. Hand, in accordance with his agreement. And besides, he permitted the purchaser still further to act on the understanding that Decker was his agent, and on that understanding to pay the balance of the purchase money to Decker, and it appears that it was only when he found that Decker was unable to pay him the money which he had thus knowingly permitted him to receive as his agent, that he denied and repudiated his agency. On the plainest principles, his answer cannot avail him.

The complainants are entitled to the specific performance of the agreement. There will be a decree, accordingly.

Reilly v. Smith.

REILLY vs. SMITH and wife.

1. Where a wife refuses to join in a conveyance of lands which her husband has sold, and there is no proof of fraud on the part of the husband in her refusal, the court will not compel the husband to procure a conveyance or release by her, or require him to furnish an indemnity against her dower.

2. Specific performance in such case refused, and the purchaser left to his remedy at law, it not appearing that he was willing to pay the full balance of the purchase money and accept a deed from the vendor alone.

On final hearing on pleadings and proofs.

Mr. M. R. Kenny, for complainant.

Mr. E. E. Coe, for defendants.

THE CHANCELLOR.

This is a suit for specific performance. The defendant, Michael Smith, being the owner of a house and lot in Newark, employed Davis and Rodrige, auctioneers, of that city, to sell the property for him at public auction. The sale was made and the property struck off to the complainant at \$875, cash. Smith was satisfied with the sale and so expressed himself. The complainant complied with the terms, paying \$50 on account of the purchase money, at the close of the sale. The auctioneers gave him a receipt for the money, acknowledging the sale and specifying the time and place when and where the balance of the price was to be paid and the deed delivered. Though the complainant was ready, at the time and place so designated, to pay the money and receive the deed, Smith did not appear, and subsequently refused to convey the property. Both Smith and his wife were present at the sale, and one of the auctioneers testifies that the latter expressed her willingness that the property should be sold, provided it should bring not less than \$800.

Reilly v. Smith.

The bill alleges that Smith and his wife refuse to convey the property, and prays that they may be decreed to convey it to the complainant. The defendants have both answered, denying their obligation to convey the property to the complainant, while they admit that he purchased it at the auction. The answer protests that Mrs. Smith ought not to have been made a party to the suit, and that she ought not to be compelled to join in a conveyance of the property to the complainant, and prays the same advantage of the objection that would have been accorded on demurrer. The bill and answer both show a refusal on the part of the wife to join in the conveyance. The evidence also shows it. There is no proof, nor is there any allegation of fraud on the part of the husband in her refusal. On the other hand, it clearly appears from the testimony, that she is actuated by considerations having reference to her own interest alone. The court will not, under such circumstances, compel her husband to procure a conveyance or release by her, or require him to furnish an indemnity against her dower. *Young v. Paul*, 2 Stockt. 401; *Haucrally v. Warren*, 3 C. E. Green 124; *Riesz's Appeal*, 73 Penn. St. Rep. 485; *Story's Eq. Jur.*, §§ 731-735.

Inasmuch as it does not appear that the complainant is willing to pay the full balance of the purchase money and accept a deed from Smith alone, a decree for specific performance must be refused, and the complainant be left to his remedy at law.

The bill will, therefore, be dismissed, but as the case is one of some hardship to the complainant, and the conduct of the defendants has not been such as to entitle them to the favorable consideration of the court in this respect, it will be without costs.

Washington Life Insurance Co. v. Paterson Silk Manufacturing Co.

**THE WASHINGTON LIFE INSURANCE COMPANY vs. THE
PATERSON SILK MANUFACTURING COMPANY and
others.**

1. It is not incumbent on a foreign corporation, complainant, to prove their corporate existence when the answer raises no question as to their existence, or right to sue, but sets up a defence on the merits alone.

2. The unsupported testimony of a defendant seeking to avoid a mortgage debt on the ground of usury, that the broker to whom he applied for the loan which the mortgage was given to secure, told him that he was the agent of the mortgagee, to make loans, cannot affect the mortgagee.

3. A requirement by the lender, (an insurance company,) that the borrower take out a policy of insurance as a condition of making the loan, is not, of itself, evidence of a usurious agreement.

On final hearing on pleadings and proofs.

Mr. A. S. Boyd, for complainants.

Mr. G. S. Hilton, for defendants.

THE CHANCELLOR.

This suit is brought for the foreclosure and sale of certain mortgaged premises, in Paterson, now owned by the Paterson Silk Manufacturing Company. The complainant's mortgage, which is dated February 2d, 1871, was given them by John Byard, while he was the owner of the premises, to secure the payment of \$18,000, with interest. Subsequently sold and conveyed the premises to the Paterson Silk Manufacturing Company, a corporation created by a special act of the legislature of this state, subject to the encumbrance of the complainants' mortgage, which, by deed, the grantees therein assumed to pay, the amount being computed and allowed to them as part of the purchase money. On or about the 1st of March, 1873, the sil

Washington Life Insurance Co. v. Paterson Silk Manufacturing Co.

ny mortgaged the premises to the defendant, John R. Daggers, in trust, to secure bonds to the aggregate amount of \$10,000, which they proposed to issue under the authority given them in that year by the legislature. They appear to have issued these bonds only to the amount of \$4800, \$4000 of which they had, at the time of filing the answers, bought and cancelled. They and Daggers have answered, setting up usury against the complainants' mortgage, and claiming deduction, in respect of the alleged usury, of \$3049.20, with all interest which may have been paid on the mortgage.

On the argument, it was insisted by the defendants' counsel, that the bill must be dismissed, because the complainants, who are a corporation under the laws of the state of New York, and are there located, offered no evidence of their existence. But, although the complainants sue as a foreign corporation, styling themselves in the bill the Washington Life Insurance Company, of the city of New York, neither of the answers raises any question as to their existence or right to sue, but both of them set up a defence on the merits alone. Under these answers I do not think it was incumbent on the complainants to prove their corporate existence.

The answers allege that Byard, being in straitened circumstances, applied to the complainants' agent, Samuel S. Wood, Jr., in the city of New York, for a loan of \$25,000 upon the mortgaged premises, and that it was agreed upon between them that the complainants should lend Byard \$18,000, for which, with interest at seven per cent. per annum, he was to give them his mortgage on the mortgaged premises, and to give them a bonus or premium of \$2000, and take a policy on his life for \$10,000, to be issued by them. They allege that on those terms only was he able to get the money. The answers state that this agreement was executed, and that Byard, accordingly, paid to the complainants the \$2000 premium, and took out the life policy, paying to them as the premium therefor, \$1049.20, besides a policy fee of \$1.

The transaction seems to have been this: Byard being in need of money, and being the owner of a very valuable

Washington Life Insurance Co. v. Paterson Silk Manufacturing Co.

factory property in Paterson, applied to Wood, who was an insurance and loan broker, in the city of New York, for a loan of \$25,000, on mortgage on his real estate; Wood applied to the complainants for the loan, which they declined. By the advice of Wood, Byard made a new application for a smaller sum, \$18,000, and to strengthen it, proposed, by Wood's advice, to take out a policy upon his life for \$10,000, from the complainants, and pay the first year's premium out of the money he sought to borrow. This application was successful. It was agreed between Byard and Wood that the latter, if successful in obtaining the loan, should have for his services, including fees for searches and counsel fees in regard to the title, \$2000. Byard swears that when the money was paid it was paid by a check for \$18,000 to his order, which was delivered by Wood to the attorneys of the complainants, who then, in Wood's presence, obtained Byard's endorsement on it, and that they then, retaining that check, gave Byard their check for the balance, between \$14,000 and \$15,000, remaining after deducting the premium on the policy and the \$2000 commissions. He is undoubtedly mistaken in reference to the manner and time of payment. The complainants' check was payable to the attorneys. The latter appear to have deducted the amount of their bill for searches, &c., \$259.08, and the amount of the premium on the life policy, and also the premium on \$20,000 of fire insurance, which was to be obtained as collateral to the mortgage, and to have paid over to him by their various checks, dated on the 3d and 4th days of February, 1871, all of the balance, except \$1000, which they retained as security that certain unsatisfied liens on the property should be discharged. This money they afterwards paid to him on receiving evidence that those liens had been cancelled. One of these checks for \$1740.92 was delivered to Wood. There is no evidence in the cause that Wood was the complainants' agent in this matter, except Byard's testimony. He swears that Wood told him that he was the agent of the complainants to make loans of money. Were this uncontradicted, it cannot, on

 Allen's Executor v. Roll.

ious principles, standing entirely alone as it does, affect complainants. *Faulkner v. Whitaker*, 3 *Green* 438, ; *Muir v. Newark Savings Inst.*, 1 *C. E. Green* 537, 539 ; *Over v. Van Mater*, 3 *C. E. Green* 481. But it is explicitly lied by Wood, who swears that he was in no sense the at of the complainants in lending the money; that the plainants never received one dollar of the bonus, but , on the other hand, it was shared by him with those o had been instrumental in bringing Byard to him.

The defendants' counsel, on the hearing, insisted that the plainants imposed on Byard, as terms on which alone loan would be made, the taking out of a life policy, that that was intended as a mere cover for usury. It s not appear, however, that the taking out of the policy s a condition. It is probable that it was proposed by ard himself, as an inducement, and so became part and cel of the agreement. But if it be admitted that it was a dition of the loan, it is not evidence of a usurious agreement. e policy was taken out at the usual rate, and there is no dence whatever, that it was designed as a cover for unlawful ertest. *Grosvenor v. Flax Co.*, 1 *Green's Ch.* 543 ; *Griffin N. J. Oil Co.*, 3 *Stockt.* 50 ; *Utica Insurance Co. v. Cald-* l, 3 *Wend.* 295 ; *New York Fire Ins. Co. v. Donaldson*, 3 r. 199.

The defendants are not entitled to the deduction claimed, any part of it. There will be a decree for the complain- s, in accordance with these views, for the amount of prin- al and interest due on their mortgage, according to its ms.

 ALLEN'S EXECUTOR vs. ROLL.

• *Cestuis que trust* are necessary parties to a bill for foreclosure by their tee.

• An allegation in the answer, as a defence to a bill for foreclosure of a chase money mortgage, that "part" of the land intended to be con-

Allen's Executor v. Roll.

veyed, has been omitted from the description by metes and bounds, without stating what part, or whether the land is not otherwise sufficiently described to be fully identified, is insufficient.

3. The defence of an alleged error in his deed cannot avail the defendant under his answer to a suit for foreclosure of a purchase money mortgage.

4. A defendant can have positive relief against the complainant, even as to the subject matter of the suit, only by cross-bill.

On exceptions to master's report upon exceptions to answer.

Mr. B. A. Vail, for complainant.

Mr. T. H. Shafer, for defendant.

THE CHANCELLOR.

This case comes before me on two exceptions filed by the defendant, to the report of a master upon exceptions to the answer. The suit is for the foreclosure of a mortgage given to the complainant's testator, as guardian of certain infants, on the 13th of April, 1866, to secure the payment of part of the purchase money of land of the infants, sold to the defendant and Ferdinand Blancke, under an order of the Orphans Court of the county of Union. The exceptions to the answer were three in number. The master reported that the first was not well taken, but that the other two were. The second exception to the answer is to the objection therein made, that the *cestuis que trust* ought to have been joined with the executor as parties to this suit. The third is to the defence set up in the answer, that the deed of conveyance from the guardian to the defendant and Blancke, is defective in its description by metes and bounds of the land intended to be conveyed thereby.

The mortgage in suit is not assets in the hands of the complainant. He holds it merely as his testator held it, as trustee. *Deering v. Torrington*, 1 Salk. 79; *Kip v. The Bank of New York*, 10 Johns. 63; *Dias v. Brunell's Executor*, 24 Wend. 9; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Perry on Trusts*, § 344; *Willis on Trusts* 53, 111; *Trecothick*

Allen's Executor v. Roll.

lin, 4 *Mason* 16; *De Valengin's Adm'rs v. Duffy*, 14 282; *Banks v. Wilkes*, 3 *Sandf. Ch. R.* 99; *Bowman v. Metaux*, *Hoffm.* 150; *Matthews on Executors* 119, 243. Justice Story, in *Trecothick v. Austin*: "Executors are clothed with no more, in virtue of their office, than the administration of the assets of the testator. If, at the time of death, there is any specified personal property in his hands, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, or other things, is not assets to be applied in payment of debt, or to be distributed among his heirs, but is to be administered by the executors as the testator himself held it." According to the settled rule, the *cestuis que trust* should give rise to the bill. *Story's Eq. Pl.*, § 201; *Stillwell v. May*, 1 *Green's Ch.* 305; *Large v. Van Doren*, 1 *McCart. & Hol's Executors v. Higgins*, ante, p. 117. The second objection to the answer was not well taken. The first exception to the report must, therefore, be sustained.

The answer as to the defence above alluded to, based on alleged defects in the deed of conveyance, is insufficient. It alleges that "part" of the land intended to be conveyed by the alleged error, been omitted from the description of the land and bounds, but what part, and whether much or little, and whether the land is not otherwise sufficiently described to be fully identified, cannot be gathered from the answer.

It admits that the contents—the number of acres—correctly stated. No eviction is alleged, nor any failure in possession of all the land purchased. No ejectment commenced. No fraud is imputed, but a mistake, in the respect above mentioned. Nor does the answer disclose whether the error is essential or not.

The defendant insists that he ought not to be required to pay the money due on the mortgage, until the deed be corrected.

The answer seeks affirmative relief—the re-formation of the deed. Apart from the consideration that it does not

Thropp v. Field.

appear from the defendant's own statement in his answer, that he is entitled to any relief, this defence cannot, according to the established rules of equity, be entertained under the answer. A defendant can have no positive relief against the complainant, even as to the subject matter of the suit, unless a cross-bill is filed for the purpose. *Miller v. Gregory*, 1 C. E. Green 274; *Onderdonk v. Gray*, 4 C. E. Green 65; *Leddel's Executor v. Starr*, Id. 159; *O'Brien v. Hulfish*, 7 C. E. Green 471.

The second exception to the report is therefore overruled.

THROPP and others vs. FIELD.

That the injury complained of was done before the service of the injunction upon the defendant, and that his acts since the service of the injunction have done the complainant no further injury, will not, when those acts were intended to make the injury complete, and the obvious intention of the interdict was to prohibit him from continuing the injury, relieve the defendant from the effects of his violation of the injunction.

On order to show cause why defendant should not be committed for contempt as for violation of injunction.

Mr. A. Reed, for complainant.

Mr. E. T. Green, for defendant.

THE CHANCELLOR.

On the filing of the bill in this cause, an injunction was issued by the injunction master, which, after reciting that the bill complained that the defendant had removed and intended to remove certain belts, communicating power to the machinery of the complainants, and had obstructed or disconnected a pipe, supplying a blast to the forges of the complainants, enjoined the defendant to desist and refrain from remov-

Thropp v. Field.

any belt or gearing connecting the power of the defendant's engine with the machinery in and on the premises leased to him to the complainants, and from obstructing the blast to the complainant's forges in and on the leased premises, and from any act interfering with the furnishing of the necessary power to complainant's machinery, as furnished at the time of executing the lease, and from doing or causing to be done, any act interfering with the free and full enjoyment by the complainants, of the covenants in the lease, until the possession of the complainants under the lease, should be terminated by lapse of time, or until the further order of the court.

The bill states, that in 1871, the complainants having held their premises, (a machine shop, foundry and blacksmith shop,) under lease from the defendant, for the five years next ensuing, again leased them of him for the purposes of their business, for a further term of five years, with privilege of renewal; that the lease provided that the power requisite for their business should be provided by the defendant at his expense; that it was, in fact, furnished by means of shafting and belting from the engine on his premises adjoining, the blast for their forges being furnished through a pipe leading from the fan on his premises to theirs; that on the 27th of July last, he, claiming a right to put an end to the lease for non-payment of rent, entered on their premises and detached the belt, and by digging down to the pipe on his premises and in some way obstructing it, cut off the blast, and that they with difficulty and danger, replaced the belt and so continued the power from the engine to the shafting on their premises. These matters stood at the filing of the bill; the power was being furnished from the engine to the shafting on the complainants' premises, but the blast continued to be obstructed. The defendant says, the obstruction was a "damper" which he put in. Whatever it was, it was an obstruction, evidently intended to deprive the complainants of the blast. After the injunction was served, the defendant took up and removed a considerable portion of the pipe by which the blast had been conducted from his premises to those of the complain-

Manko v. Borough of Chambersburgh.

ants, and closed up the remaining portion at the ends which had been made by the removal of the piece.

On motion, based on affidavit, an order was made that for this act, he be committed for contempt as for a violation of the injunction, unless he should show cause to the contrary. He now for cause urges, that when the bill was filed, the blast was effectually cut off by the damper, and that therefore, his act in taking up the pipe and closing the ends made by the removal of a part of it, in no wise injuriously affected the complainants; and further, that the injunction did not in terms, restrain him from the act complained of, and that the writ was not mandatory in form, and will not be construed as if it were intended to be so.

It is clear that the defendant has violated the mandate of this court. The obvious intention of the interdict was to prohibit him from continuing to obstruct the blast to the forges of the complainants. Notwithstanding that prohibition, he completely severed the connection between the fan and the complainants' premises, and forbade the complainants to enter upon his premises to restore it. The damper was a temporary obstruction merely; the removal of the pipe was a complete destruction of the connection, and it was intended to be so. He must be adjudged to be in contempt.

MANKO vs. BOROUGH OF CHAMBERSBURGH.

An injunction, issued to restrain municipal authorities from proceeding under their charter to remove a building alleged to encroach upon the line of a street, will not be dissolved upon the hearing on bill and answer, where such building was erected under a claim of right, on a line on which for a period of thirteen years numerous houses had been built, where no public inconvenience will be occasioned by continuing the injunction, and where the private interests involved are considerable, and the questions raised affect not only the complainant but others, who have erected buildings in like position and under like circumstances.

Manko v. Borough of Chambersburgh.

On motion to dissolve injunction.

Mr. A. Reed, for the motion.

Mr. E. T. Green and *Mr. A. G. Richey*, contra.

THE CHANCELLOR.

The defendants, a municipal corporation of this state, under the power given by their charter, (*Pamph. L.*, 1872, p. 1044,) to remove encroachments from their streets, ordered the complainant to remove a brick building he had erected on his lot on the westerly side of Broad street, within the limits of their municipality. He insists that the front of the building is on the true westerly line of the street. They, on the other hand, insist that it encroaches for its whole width, a depth of five feet nine and a half inches on the street. On the filing of the bill, an injunction was granted. The defendants having answered, now move to dissolve it. Their answer is put in under their corporate seal, and is not verified by oath, except as some of the matters therein contained are sworn to in the two affidavits appended to it. On the argument, it was insisted by the complainant's counsel, that the fact that all the material facts and denials of the answer are not sworn to, was of itself sufficient to induce the court to refuse to dissolve the injunction. As this case presents itself to me, I do not deem it necessary to pass upon that question. The bill alleges, that for about fifty years, the westerly line of the street has been that on which the complainant's house is built; that it has been, for all that time, well defined and established, and that it is the true line, and that from about 1825 to 1852 the road fence was maintained there, accordingly. The bill further states, and there is no dispute in regard to the fact, that at various periods from three to thirteen years past, numerous houses have been built in the immediate vicinity of the complainant's lot, on the line on which his house is built. One of these is on the lot which adjoins his on the southerly

Huber r. Diebold.

side, and another is on a lot only twenty-five feet distant from his, on the northerly side.

The case is one in which the injunction should be retained until the final hearing. In *Varick v. Corporation of New York*, 4 *Johns. Ch.* 53, a case resembling this in its features, it was held on final hearing, that after a claim of right, accompanied with actual and constant possession for twenty-five years and upwards, the corporation of the city of New York could not be permitted, without due process of law, to enter upon the possession of the plaintiff and pull down buildings, fences, &c., under their right to regulate highways.

The street, according to the claim of the defendants, should be sixty-six feet wide. It appears that it is now about sixty. No public inconvenience will be occasioned by continuing the injunction. On the other hand, the private interests involved are considerable, and the questions raised in this cause, affect not only the complainant, but his neighbors also, who, having under like circumstances and for the same reason, built their houses on the same line on which he has built his, are liable to the like action at the hands of the officers of the borough. It is therefore important, that the questions involved in this case should be fully and deliberately investigated and settled.

The motion is denied, with costs.

HUBER vs. DIEBOLD and others.

1. Where, at the reference before a master, an encumbrancer finds that a co-defendant, also holding an encumbrance upon the mortgaged premises, claims an unjust priority over him, and nothing has appeared in the case to lead him to suppose that such priority would be claimed, and he is unable effectually to litigate the matter and resist the claim before the master, the court will, if necessary to his protection, and to effectuate the ends of justice, give him leave to file a cross-bill.

Huber v. Diebold.

2. In the absence of proof as to the time of delivery of a deed, the presumption is, that it was delivered on the day of its date.

3. If, by agreement, a deed is to be delivered at a future day, and the vendor takes a purchase money mortgage on the land, but does not record it before the day on which the deed is to be delivered, and the deed is not delivered before that day, and, in the meanwhile, the purchaser erects buildings on the land, the estate of the vendor is not subject to a lien for materials used in the construction of such buildings, and the purchase money mortgage is entitled to priority over the lien claim.

On exceptions to master's report.

Mr. Borchering, for exceptant.

Mr. B. A. Vail, contra.

THE CHANCELLOR.

This is a foreclosure suit. The mortgaged premises are land in Rahway, in the county of Union, on which are a dwelling-house, brewery, and other buildings. There is no controversy as to the complainant's mortgage, which is admitted to be the first encumbrance. But the defendant, Christopher Trefz, claims that the master should have reported that his mortgage is next in order of priority, whereas he has reported that a lien claim in favor of Ayres, Lufbery & Co., is next, and that the mortgage of Trefz is third. To the report in this respect, exception is taken. It appears that Trefz purchased the mortgaged premises at sheriff's sale, and that they were conveyed to him, accordingly, by deed, dated June 5th, 1869. He subsequently, verbally agreed with Diebold and his wife, to sell the property to the latter. He was to take a mortgage for part of the purchase money, and it was part of the agreement, that the complainant's mortgage should have priority over his. The complainant's mortgage is dated June 1st, 1870, and was recorded on the 15th of August following. The mortgage to Trefz is also dated June 1st, 1870, but was not recorded until the 27th of December, in that year. The deed from Trefz to Mrs. Diebold is dated

Huber v. Diebold.

on the 22d of March, 1870, was acknowledged on the 7th of June following, but was not recorded until the 15th of February, 1871. The lien claim of Ayres, Lufbery & Co., was filed against Diebold and his wife, to compel payment for certain building materials furnished, as they allege, to Mrs. Diebold, between the 18th of October, 1870, and the 18th of October, 1871, and used in building an addition to the brewery. Under proceedings on this claim, a judgment, general as to Diebold and wife, and special as to the premises (part of the mortgaged premises) described in their claim, was entered in the Union Circuit Court, on the 14th of February, 1872, for \$688.03. Execution against the premises was issued on the judgment, on the same day.

Trefz excepts to the report, because the master has given to this claim priority over his mortgage. He alleges and insists that the deed from him to Mrs. Diebold, was not delivered until after the greater part of the materials for which the lien was claimed was furnished; that he had no notice of this lien claim, and that, as to him, it is a nullity, and cannot prevail against his mortgage. But the evidence before the master did not establish the fact that the deed to Mrs. Diebold was not delivered until after the greater part of the materials were furnished. As before stated, that deed is dated on the 22d of March, 1870. It was acknowledged on the 7th of June, 1870, but was not recorded until February 15th, 1871. It does not appear when it was delivered. The materials for which the lien was claimed were furnished, according to the bill of particulars, between September 28th, 1870, and January 27th, 1871—both days inclusive. From the evidence before him, the master would not have been justified in finding that the deed to Mrs. Diebold was not delivered until after these materials were furnished. In the absence of proof as to the time of its delivery, the presumption is, that a deed was delivered on the day of its date. The exception must, therefore, be overruled.

The complainant's counsel insists that the lien claim cannot be attacked by Trefz, because he has not set up any defence

Barrell v. Barrell.

to it in his answer. There is nothing, it may be remarked, in the statement of the claim of Ayres, Lufbery & Co., in the bill of complaint, to induce Trefz to suppose that they would claim that their lien is entitled to priority over his mortgage. A creditor, in such a case as this, may find, to his surprise, on going before the master, that his co-defendant, also an encumbrancer, claims an unjust priority over him. He may, or he may not, be able effectually to litigate the matter, and resist the claim there. If, in such case, it should be necessary to his protection, and to effectuate the ends of justice, the court would give him leave to file a cross-bill. *Story's Eq. Pl.*, §§ 396, 397 ; *Latouche v. Dunsany*, 1 *Sch. & Lef.* 137, 149.

If the deed was not delivered until the 27th of December, the case would seem to be within the ruling of this court in *The National Bank of the Metropolis v. Sprague*, 5 *C. E. Green* 13. In that case there was a contract in writing to convey. Before the conveyance, the purchasers erected new buildings, and made extensive alterations on the premises, in respect to which buildings and alterations a lien was claimed. The court held that the estate of the vendor was not subject to the lien, and, therefore, that his mortgage for purchase money was entitled to priority over the lien claim.

BARRELL vs. BARRELL and others.

1. To entitle a tenant in common to an account of rents and profits from his co-tenant for use and occupation of premises held in common, he must show exclusive possession of the premises, or that some profit has been derived therefrom for which the co-tenant ought to account.

2. Though no question be made as to the legal title of a tenant in common to the share which he claims to own in the real estate of which he seeks partition, yet, where a partition is sought in a court of equity, it will only be accorded on equitable terms, where it seems to the court just that such terms should be imposed.

Barrell v. Barrell.

3. After certain specific devises to his sons, G. and H., the testator directed, that in the division of his estate, the sum of \$8000 be charged to G., and \$11,000 to H., on account of the real estate specifically devised to them, and gave the rest of his estate, real and personal, to his four children, G., H., M., and C., to be equally divided between them. G. and H. were appointed executors, and proved the will. They took the entire personal property, and still hold a large surplus of it, refusing, without reason, to pay to M. and C. their proportions of such surplus, or of the \$19,000 charged by the will upon G. and H. G. filed his bill for partition of the real estate not specifically devised, against the other children. *Held*, that the shares of G. and H., in the residuary real estate, must be charged respectively with the three-fourths of \$8000 and \$11,000, with which they were made chargeable by the will.

Bill for partition and account. On final hearing on pleadings and proofs.

Mr. J. W. Taylor, for complainant.

Mr. D. A. Hayes, for Mary Barrell.

Mr. C. E. Green, for Charles Barrell.

THE CHANCELLOR.

George Barrell, late of the county of Essex, died on the 11th of February, 1870, leaving four children, George, Mary, Henry, and Charles. By his will, after directing payment of his debts, he devised to his son George, the complainant, in fee, a brick house and the lot of land of about two and a quarter acres, in East Orange, in that county, whereon the same was situated, with all the improvements which might be on the property at the time of the testator's decease. To his son Henry, he devised, in fee, a farm in the township of New Providence, in the county of Union. Both George and Henry were, at the time of the testator's death, in the occupation of these respective properties. After these devises, the testator directs that in the division of his estate, the sum of \$8000 be charged to George, and \$11,000 to Henry, on account of the real estate thus specifically devised to them.

Barrell v. Barrell.

se sums, he states, are the values he puts upon those properties, and he declares that it is his will that the valuation should not be changed, and that those devises should, under circumstances, be changed or disturbed. After making a bequest of \$500, in lieu of commissions, to Meadows P. Nicholson, whom he appoints one of his executors, he gives all the residue of his estate, real and personal, to his children, to be equally divided between them, and provides and directs that in case of the death of any one or more of them, without leaving lawful issue, the share or shares of the one or more dying, shall go to the survivors or survivor, but that if any of them shall die, leaving lawful issue living, such issue shall take the share of the parent. He appointed his sons, George and Henry, with Meadows P. Nicholson, executors. The will was proved by George and Henry alone, the other executor having declined to act. Of the testator's children, George, Mary and Charles, are unmarried. George and Henry are married, and each has lawful issue living. Besides the real estate specifically devised, the testator died seized of valuable real property in the county of Essex. He owned at his death, a large amount of personal property, principally, valuable securities. According to the inventory, it amounted to about \$90,000.

The bill prays a partition of his real estate, not specifically devised, among his four children, and that Charles and Mary, who, since their father's decease, have been in possession of the homestead, may account for the rent of that property since the testator's death. Charles and Mary have answered. They deny their liability to account, and allege that the entire personal estate of the testator was taken by George and Henry into their possession, and that they still hold a large part of it, and although the debts are all paid, and a large surplus is left for distribution, refuse to pay them their shares of it, and refuse, also, to pay them their proportion, or any part of it, of the \$19,000 with which the will makes George and Henry chargeable in the division of the estate.

It does not appear that the occupation, by Charles and

Barrell v. Barrell.

Mary, of the homestead, has been exclusive, or that they have derived any profit from it for which they ought to account to their brothers. At the time of their father's death, they were part of his family—Mary was his housekeeper, he being a widower. After his death they continued to reside there. The homestead consisted of a house and four acres of land, of which one was in lawn around the house. During their occupation after their father's death, they cultivated a small garden of about one-tenth of an acre. The rest of the land was not cultivated. It is in evidence that they made the necessary repairs and kept up the property at their expense, hiring laborers and others for the work. They did not occupy the whole house. Their brothers made no claim to the possession of the property, or any part of it, nor did Charles and Mary, or either of them, in any wise hinder them from occupying their shares of the homestead, if they had seen fit to do so. There is no ground for requiring Charles and Mary to account. *Davidson v. Thompson*, 7 C. E. Green 83; 1 Washb. on R. P., ed. 1860, p. 420. §§ 14, 15; *Sargent v. Parsons*, 12 Mass. 152.

Charles and Mary protest against a partition, unless it be made on such terms as, at least, to secure to them the benefit of the charges which the will directs to be made against George and Henry, in respect to the land specifically devised to them. The complainant insists that the considerations presented by the answer, cannot, properly, influence or affect the action of this court, seeing that no question is made as to the legal title of the complainant to the share which he claims to own in the real estate of which he seeks partition. But, when partition is sought in this court, it will only be accorded on equitable terms, when it seems to the court just that such terms should be imposed. *Doughaday v. Crowell*, 3 Stett. 201; *Haines v. Haines*, 4 Md. Ch. R. 133. The court cannot be successfully called upon to work injustice. The fact that the complainant might obtain partition at law, or that he is entirely at liberty to sell his undivided interest in the real estate in question, will not induce this court to

Barrell v. Barrell.

grant him the unqualified partition he seeks, if it appear that it **would** be unjust to do so. He has come into this court for **equity**, he must, therefore, do equity. That he and his brother **Henry** have possession of a large amount of their father's **personal** estate, and between them have held it ever since **their** father's death, is not denied. Nor is it denied that they **have** not paid to their brother and sister their shares of it, **although** they have frequently been requested to make such **payment**. That George and Henry have not paid to their brother and sister their proportions of the money with which they were to be charged in the division of the estate, in respect of the lands specifically devised to them, is proved, and indeed is not denied, and it is proved that the complainant has refused to pay anything on account of the \$8000 with which he is to be charged. No reason whatever is given, nor is any excuse offered, although all the parties were sworn as witnesses, for thus withholding from Charles and Mary their shares of their father's estate. The sums to be charged in respect of the real estate are not charged upon the lands. Charles and Mary have no security for either their shares of that money, or of the personal estate, beyond the personal responsibility of George and Henry.

The complainant is before this court, asking for a division of part of the estate. It is but just that he and his brother Henry should be required, in the division to be made here, to account to their brother and sister for their shares of the amounts charged in respect of the specific devises of real property to them. That can be done by charging the share of each of them in the real estate to be divided, with three-fourths of the amount with which, by the will, he is made chargeable in the division. The charge is to be for the equal benefit of his co-devisees.

Decree accordingly.

Driggs v. Garretson.

DRIGGS vs. GARRETSON.

1. A stated account is, *prima facie*, a bar to a suit for account. But the defendant in pleading it, must, by his plea, although neither fraud nor error be charged, aver that the stated account is just and true, to the best of his knowledge and belief.

2. For want of such averment, plea overruled, with leave to amend.

On bill for account. Plea of account stated.

Mr. A. Zabriskie, for the plea.

Mr. W. B. Williams, contra.

THE CHANCELLOR.

The bill is filed for an account. The complainant, who is the defendant's mother, was his general guardian by appointment of the Orphans Court of Hudson county, and his special guardian appointed under proceedings taken in this court, for sale of his lands while he was yet a minor. The bill does not allege that any account was ever stated between the parties. The defendant pleads that at a date which appears by the bill to be subsequent to the time when he attained his majority, the complainant and defendant made up and stated an account in writing, of all sums of money received by the complainant as guardian of the defendant, and of all moneys paid out by her, and of her money transactions as such guardian; that the account was made out by, or under her direction, and that it was inspected and examined by him and was signed as correct by both of them, and was retained by the complainant, no counterpart or copy having been given to the defendant. The plea further avers, that the amount so stated and allowed, showed in writing a balance of \$2777.05, as due to the defendant from the complainant as his guardian,

Haines v. Pohlmann.

that the defendant has since then received part of that
ce.

stated account is, *prima facie*, a bar to a suit for account.
n v. *Van Dyke*, 4 *Halst. Ch.* 795 ; *Gilb. For. Rom.* 56.

he defendant in pleading it, must, by his plea, although
er fraud nor error be charged, aver that the stated
nt is just and true to the best of his knowledge and

Story's Eq. Pl., § 802 ; 3 *Atk.* 70 ; *Madd. Ch. Pr.*
Roche v. Morgell, 2 *Sch. & Lef.* 721.

is plea is defective in this respect, and therefore must be
iled. Leave will be given, however, to amend.

HAINES vs. POHLMANN and others.

is well settled that a debtor is authorized to infer that an attorney
at who has been employed to make a loan, is empowered to receive
rincipal and interest, from his having possession of the bond and
ge given for the loan, or of the bond only. But the inference in
ases is founded on the custody of the securities, and it ceases when-
ey are withdrawn by the creditor ; and it is incumbent on the
who makes payment to the attorney or agent, relying upon such in-
, to show that the securities were in his possession on each occasion
he payments were made.

ayments made to an agent on account of principal and interest of a
allowed the debtor, the action of the creditor estopping him from
g the agency, and relieving the debtor from seeing to it that the
had possession of the securities when the payments were made.

final hearing on pleadings and proofs.

r. *J. Flemming*, for complainant.

r. *E. S. Cowles*, for Pohlmann.

IE CHANCELLOR.

ie sole question between the parties to this suit (which is
ght for foreclosure and sale of mortgaged premises in
y City,) is, whether two payments, one of principal, \$500,

Haines v. Pohlmann.

and the other of interest, made on the mortgage in suit, shall be allowed or not. The mortgage, which was given May 1st, 1867, by Bernhard Pohlmann to Mulford M. Cavileer, to secure the payment of \$2000 in three years from that date, with interest payable half yearly, contained a provision that the mortgagor might pay the principal at any time in sums of not less than \$500 each. Mulford M. Cavileer died November 16th, 1867. By his will he gave all his property to his father, Peter Cavileer, in trust for the testator's brother, Morris, and appointed his father executor. When the mortgage in suit was given, one Sharon H. Waples, then an attorney-at-law of this state, practicing in Jersey City, was the attorney of the Cavileers, and generally attended to their legal affairs. In that transaction, he drew the papers which were executed by the Cavileers. He subsequently, on Thanksgiving day, 1868, married Amelia A. Cavileer, the daughter of Peter Cavileer. Very soon after the bond and mortgage were given, Peter Cavileer and all his family (which included Mulford,) except Amelia, left Jersey City and went to the county of Burlington, in this state, to reside, and there they resided at the time of Mulford's death, and they have ever since continued to reside there. Amelia, when the family went to Burlington county, remained in Jersey City, where she was engaged in business, and continued to reside there up to the time of her death, which occurred in March, 1869. The mortgage was given to secure part of the purchase money of the mortgaged premises, which were purchased by Pohlmann from Mulford M. Cavileer, in whom the title to them then was, and who, the complainant claims, was then the true and sole owner thereof. Pohlmann, however, when he made the purchase, on the advice of his counsel, insisted that Peter Cavileer should join in the contract for sale, it being supposed that he had some interest in the property, if indeed, the property was not in fact, wholly his. Peter Cavileer joined in and executed the contract, accordingly. Pohlmann is a German, having but an imperfect knowledge of our language. His son-in-law, William F. J. Prella, conducted the

Haines v. Pohlmann.

negotiations, and with his lawyer from New York, Mr. James Henderson, attended to the exchange of papers on the conveyance of the property to Pohlmann. Both Prella and Henderson swear, that when the first payment (which was one of \$200, and by the terms of the agreement, was to be made on the 1st of April, 1867,) was made, Mulford M. Cavileer, who received it, told them that Waples was authorized to act as their (meaning his and his father's) attorney, and attended to all their business and collected all their money. And Pohlmann, Prella and Henderson all testify, that when the bond and mortgage were delivered, Mulford M. Cavileer was not present, but his father, with Waples, attended to the transfer of the papers, and that then Peter Cavileer told them that Waples was, or would be authorized to receive the money on the bond and mortgage. Pohlmann says, in answer to the question, "what, if anything, was said to you by Peter Cavileer at the time of the execution of the mortgage, about the payment of it or the interest of it?" "He said that Mr. Waples would take the money for him and attend to all the business for him." Prella says, in answer to a like question, "I asked him, (Peter Cavileer,) who was to receive the money, either interest or principal, or any part of it. He told me that Waples would be, or was authorized to receive it." And in answer to another question he says, that Peter Cavileer told him to pay the money on the mortgage to Waples, at his office, either interest or any part of the principal, according to agreement. Henderson testifies, that in answer to a question as to whom Pohlmann should pay the interest as it should become due on the mortgage, "Peter Cavileer said we should pay it to Mr. Waples; he was authorized to receive it and receipt for it when it became due, and also the principal on the mortgage." When the interest became due on the 1st of November, 1867, Waples collected it and receipted for it. It appears that he then had the bond and mortgage. He wrote to Prella, who was Pohlmann's agent in the matter, under date of October 19th, 1867, referring to the fact that the interest would be due on the mortgage on the first of next

Haines v. Pohlmann.

month, and added, "The bond is at my office, and you can pay the interest to me and I will endorse it on the bond." This payment was endorsed by him on the bond. He collected the interest due on the 1st of May, 1868, and endorsed that also on the bond.

On the 16th of October, 1868, Prella called on Waples at the latter's office in Jersey City, and proposed to pay \$500 on account of the principal of the mortgage. He says that when he went to Waples and offered him the money, that was the first notice Waples had that he was going to pay it. Prella says, he did not ask for the bond, but Waples told him of his own accord that he had it at home, and he promised to endorse the payment upon it, and that he, Prella, signed the check which he had brought over in blank as to signature and name of payee, after Waples told him this. Subsequently Waples applied to him by letter, dated November 4th, 1868, for payment of the interest due on the first of that month. This Prella paid him. Prella says, that when he paid this money he did not ask Waples for the bond; that Waples said he had the bond at home and would endorse the interest on it. In the winter of 1868-9, Amelia was taken sick. Her mother came to Jersey City to attend her and remained there till within about two weeks of her death, which occurred, as before stated, in March, 1869. Waples appears to have absconded in February of that year. It is admitted that the interest due on the 1st of November, 1867, and the 1st of May following, respectively, were received by the Cavileers. Peter Cavileer, as executor, assigned the bond and mortgage to the complainant on the 1st of September, 1869.

The defendants insist that the payments made to Waples, were made to the duly authorized agent of the owner of the bond and mortgage for the time being; that under the authority given them by Mulford at the time of the execution of the contract, and by Peter at the time of the delivery of the bond and mortgage, Pohlmann was justified in paying the principal and interest of the mortgage to Waples, unless

Haines v. Pohlmann.

ified of the revocation of Waples' agency. That the agency of Waples for Mulford ceased with the death of the latter, on the 16th of November, 1867, is beyond all question. The disputed payments were both made after that time. But the defendants claim that Mulford was merely trustee for Peter, and that therefore the authority of Waples continued after the death of Mulford, and besides, that Peter was bound by the payments which, according to the testimony of Pohlmann, Henderson, and Prella, he had authorized Pohlmann to make to Waples, even though at the time he was not the owner of the bond and mortgage. It is insisted by the complainant that the payments to Waples were not valid against the owner of the bond and mortgage, unless Waples, at the time when they were made, had possession of these securities. It is well settled, that the debtor is authorized to infer that an attorney or scrivener who has been employed to make a loan, is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan, or of the former only. The numerous cases on this point will be found collected in *Williams v. Walker*, 2 Sandf. Ch. 325. See also *Hatfield v. Reynolds*, 34 Barb. 612; *Megary v. Funtis*, 5 Sandf. Sup. Ct. R. 376. But the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made. The disputed payments in this case cannot be allowed to the mortgagor, unless the evidence is such as under the law to establish the agency of Waples as against Peter Cavileer, or to estop the latter from denying such agency and to relieve the mortgagor from the necessity of seeing to it, that the agent had possession of the securities when the payments were made. The wife of Peter Cavileer swears that in May, 1868, she came to Jersey City and got the bond and mortgage from Amelia and took them home with her; that she

Haines v. Pohlmann.

afterwards, and on that visit, went to New York and saw Prella, who was Pohlmann's agent, and told him that Mulford was dead and that he need not pay any of the principal, and not to pay the interest unless it was endorsed on the bond. She says, that Prella then said that Waples had collected the interest on the 1st of May, and she told him not to pay any more unless he had the bond to see it endorsed upon it. She adds, that she told him not to pay any of the principal to Waples. Prella, however, denies that she said anything to him about paying Waples, prior to a visit which she made to his store in February or March, 1869, which was after the disputed payments were made. I think Mrs. Cavileer is mistaken in regard to the time when this visit took place; that it was in February or March, 1869, instead of May, 1868. Her husband testified that it was after Amelia had told him that the third payment of interest had been made, which was that which was due on the 1st of November, 1868. He says, he then became alarmed and told his wife to go to Jersey City, and stop Waples from having anything to do with the family, and to go to New York and tell Pohlmann not to pay anything on the mortgage to any living man; that, some time in March, 1869, his wife came to Jersey City to see Amelia, who was sick; that his wife then heard and informed him that Waples had collected \$500 of the principal of the bond and mortgage, and he thinks this was about the same time that he learned from Amelia that the third payment of interest had been made to Waples. It is true, he subsequently, and on the same day on which this testimony was given, but after he had signed his deposition and the *jurat* had been signed by the master, was recalled, and said he had made a great mistake in stating the time when he sent his wife to tell Pohlmann not to pay anything on the mortgage to any living man, and added that, as near as he could tell, it was in the spring of 1868; but the evidence in the cause leads me to conclude that his first statement was the correct one. Prella swears to an admission made by Peter Cavileer on this point. He says that Mrs. Cavileer had told him the third payment

Haines v. Pohlmann.

interest, that which was due November 1st, 1868, was endorsed on the bond, and that, on an occasion which appears to have been in or about May, 1869, when he met Peter Cavileer on the ferry-boat, in a conversation which then took place between them, Peter Cavileer told him that he would acknowledge the receipt of the \$500. He says, they then went to see the complainant, who had the bond and mortgage in his possession, and Prella then discovered that that payment of interest had not been endorsed, and he thereupon asked Peter Cavileer why it had not been endorsed, and the latter then indirectly admitted that he had received the interest, but said that, before endorsing it on the bond, he desired to consult counsel, to know whether it would be proper to do so. In that conversation Prella says that, as they were going out of Haines' store, Peter Cavileer told him that he was very sorry that he had not sent him notice to discontinue paying to Waples; that he meant to do so, but neglected it, or forgot about it. Again, there seems to have been no reason for the alleged visit of Mrs. Cavileer to Prella, in the spring of 1868. The interest due on the 1st of May in that year, had been collected by Waples and endorsed on the bond, and duly paid over to her father by Amelia. Besides, it is clear that when, in the interview with Prella, in his store, in February or March, 1869, he told Mrs. Cavileer that he had paid \$500 of the principal of the bond to Waples, she requested him not to go to see Waples in reference to the matter, for about a week, as she wanted to see him first. Now, why did she make this request, if she had, in May, 1868, gone from Burlington county to New York expressly to see Prella in reference to making payments on the bond and mortgage to Waples, and had then warned him against paying any of the principal to Waples, or making any payment of interest, without seeing it endorsed on the bond? I see no reason to doubt the candor of Prella, in giving his testimony. His action in the payment of the \$500 and the interest due November 1st, 1868, appears in all respects beyond suspicion, and it is difficult to conceive why, if he had

Haines v. Pohlmann.

the warning, or any like admonition or notice from Mrs. Cavileer, in May, 1868, he should have sought out Waples, to pay him \$500 of principal which had not been called for, and should not even have taken the precaution of ascertaining whether Waples had the bond or not, before making the payment; and so, too, of the payment of interest, subsequently made to Waples on the application of the latter. It seems strange that, if the notification was given in May, 1868, no application was made by Peter Cavileer to Prella or Pohlmann for the interest due on the 1st of November, 1868. And yet it appears, affirmatively, that none was made at any time.

The authority given to Pohlmann to pay interest and principal upon the mortgage to Waples, is proved by three witnesses, to which is opposed only the denial of Peter Cavileer, whose memory, it is obvious, from an examination of the testimony, is not always to be depended on. Nor do I think that the fact that the bond and mortgage were made to Mulford, deprives this direction of effect as to Peter Cavileer. He seems to have been regarded as the owner of the securities while Mulford was yet alive, for the interest due November 1st, 1867, is receipted under date of October 31st, 1867, in the name of Peter Cavileer alone. This was in Mulford's lifetime. And besides, he must have known from the endorsement on the bond under date of May 1st, 1868, that Waples was acting as, and was representing himself to Pohlmann to be, his agent in collecting the money on the bond and mortgage. Indeed, there is some reason to believe that the bond and mortgage always were, really, the property of Peter Cavileer.

The authority was to pay the principal and interest of the bond and mortgage to Waples. Under such an authority, it was not necessary, as between Pohlmann and Cavileer, in order to validate the payments, that the former should be able to show that the agent had possession of the securities at the time of making the payments. But it is not clear that Waples had not possession of the securities, when these pay-

Haines v. Pohlmann.

ments were made. Peter Cavileer says, that the reason why he cannot swear where the bond and mortgage were when Mulford died, is, that they were in the habit of sending the bond and mortgage to Amelia, (who, it will be remembered, became Waples' wife in November, 1868,) at Jersey City, when the interest was due, that she might collect it. The \$500 appears to be irretrievably lost. It was collected by Waples about a month before he was married to Amelia. He seems not to have accounted for it to Peter Cavileer. Very soon after the discovery was made by Mrs. Cavileer, that he had collected it, he absconded. Of two innocent parties one must suffer. Peter Cavileer authorized Pohlmann to pay to Waples as his agent. He never revoked that authority. It is he who should suffer in the premises, rather than Pohlmann.

There will be a decree for the complainant for \$1500 of principal money, and interest thereon from November 1st, 1869, the defendants having paid into court an amount equal to the interest on \$1500 for one year, from November 1st, 1868. The defendant, Pohlmann, before the filing of the original bill, (that bill was filed November 16th, 1869,) tendered to the complainant the interest due on the mortgage, allowing the payment of \$500, up to November 1st, 1869. The complainant refused to receive it. Pohlmann is therefore entitled to costs of the original bill. The supplemental bill was filed November 27th, 1871. The principal of the bond and mortgage became due in 1870. Pohlmann made no tender of the principal when or after it became due. He should pay costs of the supplemental bill.

Warwick v. Marlatt.

WARWICK vs. MARLATT and others.

1. Though strict proof of the defence of usury is required, the weight of evidence will not be disregarded under that defence.

2. The purchaser of mortgaged premises at a sheriff's sale, may avail himself of the defence of usury against a prior mortgage, though he purchased subject to that mortgage.

3. An agreement between the holder of a usurious mortgage and the mortgagor, that, in consideration of a deduction allowed the latter by the former, in the settlement of certain debts due him from the mortgagor, the mortgage should be regarded as purged of usury, will not remove the taint so long as the mortgage remains in the same hands.

4. Such holder is not entitled to recover the amount actually loaned. The supplement of April 12th, 1864, applies only to contracts thereafter made.

On final hearing on pleadings and proofs.

Mr. S. M. Schanck, for complainant.

Mr. F. Kingman, for defendants.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage given on the 10th day of October, 1860, upon land in Mercer county, by Benjamin Marlatt to Samuel F. Butcher, to secure the payment of \$800, with interest, and assigned by the latter to the complainant, on the 5th of April, 1862. The defence is usury. The property was sold by the sheriff to the defendant, John Dawes, in July, 1872, under a foreclosure of a subsequent mortgage, the holder of this mortgage not being a party to that suit. At that sale the announcement was made that the property was sold subject to the mortgage now in suit, and Dawes was informed by the complainant, before the sale was made, that there was due upon the mortgage, \$800 of principal, besides interest. The usury set up in the answer,

Warwick v. Marlatt.

the delivery by Marlatt to Butcher, pursuant to an agreement made at the time of lending the money, of a gold watch, of the value of \$60, as a premium over and above the lawful interest for the loan. Marlatt's account of the transaction is,

Butcher, having agreed to lend him the money, came to the scrivener employed to draw the bond and mortgage, at Marlatt's house, for the purpose of completing the transaction; that after the papers had been drawn, the scrivener went out of the house and was absent for a few minutes; that during the scrivener's absence, Butcher told Marlatt that he had been offered \$50 for the loan of this money, and added that he thought Marlatt ought to give him the amount which had been offered for it. Marlatt says, that he replied to Butcher that he had not expected to pay extra for the loan of the money, as he was giving him a good bond and mortgage; to which Butcher returned, that he thought Marlatt ought to give him as much as he had been offered for it, as he was in need of all the money he could get. Marlatt says, that Butcher then began to "talk off," as though Marlatt would not get the money unless he paid Butcher that amount for the loan of it; that Marlatt then told him he had made arrangements for the money, and he wanted it. Marlatt says, he pulled a gold watch out of his pocket and told Butcher he would spare that better than he could the money, and that if Butcher thought well of it, the watch was worth \$60, he would let him have that for the loan of the money; that Butcher took the watch, looked at it, said it would "suit him at that rate," that it was the very thing he wanted, and said he would let Marlatt have the money if the latter would let him have the watch; that the watch would suit him as well as the money. He swears that the watch was cheap at \$60; that it was an English gold lever watch, and that he gave it to Butcher and that Butcher received it under this agreement. That on the occasion of this loan, a watch was delivered by Marlatt to Butcher, is admitted, but Butcher swears, that he did not receive it as a premium for the loan. His account of the transaction is, that before the negotiation for the loan,

Warwick v. Marlatt.

Marlatt had bought a load of straw of him, between one hundred and fifty and two hundred bundles, which he had delivered on the premises of the latter, but for which he had not been paid ; that Marlatt never paid him for the straw until that day, and then while Butcher was at Marlatt's house, and after the bond and mortgage had been drawn, Marlatt jumped up, went out into the kitchen, as Butcher says he thinks it was, and got a watch and handed it to him ; that he asked Marlatt if the watch was for the straw, and the latter " nodded his head in a way to say, yes ;" that the scrivener had paid the money about that time or a little before ; that he handed the money to the scrivener and he paid it over to Marlatt about the time of the delivery of the watch. He says, he received the watch in part payment for the straw. In answer to the question " Was, or was not, that watch given to you for the loan of the money to Marlatt ?" he answers, " What he gave it to me for I do not know, but what I took it for I know, and it was for what I have told you." He admits in his cross-examination, that he never rendered Marlatt any bill for the straw, never gave him any receipt for it, and never asked him for a settlement, nor did Marlatt ever ask him for any. He further says, that he " expected, when Marlatt bargained for the straw, to let the straw go in with the money," and that he did not say anything to Marlatt, at the time the money was paid, about including the straw, and never spoke to him about the straw afterwards. On his re-examination, when asked to explain what he meant by saying he expected the straw to go in with the money, he said that he thought it would make the bond and mortgage a little larger. Marlatt swears he has no recollection that Butcher brought him the straw previous to the loan of the money, and adds, that he does not think he ever had any dealings with Butcher previous to the transaction of the loan. Opposed to this is the complainant's testimony, that he recollects that Marlatt, in 1860, got straw of Butcher ; that it was long rye straw to tie up peach trees ; that Butcher brought Marlatt a load, the witness cannot tell how much it was,

Warwick v. Marlatt.

xcept that it was a load ; that he saw him drive over to Marlatt's farm with it and unload it there, and Marlatt used it for tying up young peach trees. He adds, that it was in the fall of the year, he thinks, but cannot say certainly. This testimony was taken in June, 1873, about thirteen years after the alleged transaction to which it refers. The witness was in no way connected with Marlatt or his business. There appears to be no reason why he should have remembered such an occurrence at so great a distance of time, and under the circumstances, especially in view of his interest in the suit, the accuracy of his recollection may well be doubted. Butcher's testimony on the subject of the delivery of the watch, is manifestly, unworthy of credit. At best, it leads to the conclusion, that if a load of straw was delivered as he alleges, it was merely as a cover for the contemplated usury. It may be remarked in this connection, that his account of the purchase of the straw is, that on the day on which he promised Marlatt that he would let him have the money, Marlatt wanted to buy a load of straw of him ; that he wanted it when he got the money ; that he took the straw before he got the money, and that Marlatt said he would pay him for the straw the day he let him have the money. But, it is insisted by the complainant, that the evidence shows that the watch was not a gold watch of the value of \$60, but was a galvanized watch of the value of only \$3 or \$4. Marlatt swears it was a gold watch, an English lever gold watch, a good time-piece ; that it was well worth \$60, and that Butcher was satisfied with it, and said it would suit him as well as the \$50 he had asked as a premium for the loan. Butcher never complained to Marlatt that the watch was not as it had been represented, and indeed, he does not swear that it was not a gold watch. In answer to the question, "What kind of a watch was that that Mr. Marlatt gave you?" he says, "*I believe it was an oldish, galvanized watch, the plate commenced to wear off of it and it smelt pretty coppery ; it would'nt run but very little ; no dependence on the watch at all.*" When questioned as to its value, he says, "To some men it might

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I don't think it was worth quite the watch now; John Norton has an old sleigh for it, worth I suppose, \$3
The only other testimony on this head is that of the complainant, who swears that Marlatt bought a watch of a peddler, for \$13, which Marlatt said he traded to Butcher.
The witness says, Marlatt was cheated in the watch. The inference is, that that was the watch which was delivered to Butcher. It is noteworthy that though, according to the testimony of Butcher, the watch was given to him in payment for goods sold and delivered by him to Marlatt, he never made any complaint of the fraud which had been practised on him in giving him a worthless watch in payment for these goods. And further, when Warwick proposed to buy this mortgage of Butcher, he sought and obtained a deduction of \$50 from the amount due on the mortgage, in view of the usury now claimed to have been taken. It is true, strict proof of the defence of usury is required; but it is no less true that the court is not at liberty to disregard the weight of evidence under the defence of usury, any more than under any other. The usury alleged in the answer, appears to me to be proved. It is true, it is proved that on two different occasions, and in two different conversations since the commencement of this suit, one with Samuel F. Butcher and the other with his brother, Charles H. Butcher, Marlatt said the bond and mortgage were good and that he was making the defence to worry Warwick a little, but it is not to be forgotten that, before Warwick became the owner of the bond and mortgage, Marlatt told him of the usury to which Marlatt swears, and Warwick used the fact as the means of obtaining a deduction of \$50, from the amount due on the mortgage when he purchased it from Butcher.

But it is urged by the complainant's counsel, that the defence of usury cannot avail Dawes, because he purchased the mortgaged premises at the sheriff's sale, subject to this mortgage. This position is untenable. *Brolasky v. Miller*, 1 Stockt. 807.

Warwick v. Marlatt.

Again, it is insisted that if there was any usury in the loan which the bond and mortgage were given to secure, those instruments were purged of it by a settlement made in March, 1872, between the complainant and the then solicitor of Marlatt. That settlement was of the amount due to Marlatt on a certain decree of this court in his favor, and against Warwick. Under that decree a large sum of money was due from the latter to the former. Warwick, besides this mortgage, held certain judgments against Marlatt, which he had obtained by purchase for less than the amount due upon them. These he was willing to cancel, upon having the amount he had paid for them, with interest, (which was less than the amount due upon them by about \$235,) allowed him in the settlement, provided this mortgage should, in consideration of such deduction, be regarded as purged of usury. This was agreed upon between the solicitor and Warwick; the latter put in the judgments at what they had cost him, with interest, and the former, in consideration thereof, endorsed upon the bond, under date of March 14th, 1872, an acknowledgment that there was then due on the bond, to the holder thereof, the sum of \$800 principal, and signed this acknowledgment as attorney for Marlatt. In the settlement, Warwick was credited with the interest due on the full amount of the bond, up to April 1st, 1872.

The solicitor had no authority to agree with Warwick for his client, that the latter would waive the defence of usury, and besides, if he had had such authority, the bond and mortgage would not have been, by this agreement, and the payment or allowance in pursuance thereof, purged of the usury, so long as they remained in the hands of Warwick. This mortgage therefore, being still held by Warwick, is still tainted with usury, and there can therefore be no recovery upon it. The position taken by complainant's counsel, that the court might, if it found that there was usury in the loan for which the mortgage was given, give the complainant the benefit of the supplement of April 12th, 1864, to the act

Carpenter v. Carpenter.

against usury, cannot be maintained. It is enough to say that the operation of that supplement is, by its terms, confined to suits upon notes, &c., thereafter to be made. The bill must be dismissed, with costs.

CARPENTER vs. CARPENTER and wife.

1. Services rendered by a wife in the course of the discharge of her duty as a wife, do not, nor does the money she brings to her husband at their marriage, constitute a valid consideration for a conveyance of lands to her, as against the husband's creditors.

2. A conveyance made by a debtor, with a view to his future indebtedness, and to protect his property against it, is void as to creditors.

3. Representations made by a debtor in the presence of his wife, of the value of his property, which at the time, and for several years, had been in his wife's name, by voluntary conveyance from him, by which representations another is induced to suppose he is the owner of the property, and to bind himself for the payment of moneys which he was subsequently obliged to pay, estops the wife from setting up such title as against such creditor's demand.

On final hearing on pleadings and proofs.

Mr. Griggs, for complainant.

Mr. Cochran and *Mr. Coult*, for defendants.

THE CHANCELLOR.

The complainant is a judgment creditor of the defendant, John S. Carpenter, his brother. The judgment was recovered in the Supreme Court of this state, on the 20th of February, 1872, for \$4302.33. Execution against the defendant's goods and lands having been duly issued upon it, it was duly returned unsatisfied, for want of property whereon to levy. The bill is filed to subject to the payment of this debt, a farm in Sussex county, which the judgment debtor owned on the

Carpenter v. Carpenter.

3th of November, 1866, and which on that day he and his wife, the other defendant in this suit, conveyed, in fee, to their daughter Susan, by whom, on the same day, it was conveyed, in fee, to her mother.

The complainant alleges, that those conveyances, by which the title to the property was vested in the defendant, Mary Ann Carpenter, by whom it is now held, are fraudulent and void as to him, on the ground that they were made with intent to hinder, delay, and defeat the creditors of John S. Carpenter. The latter, who was a farmer, living on, and tilling the farm in question, on or about the 1st of April, 1866, contracted with one John R. Baker, for one-half of Baker's right to manufacture a patented composition called "railroad box metal," or "union metal," and one half of Baker's interest in the net profits of the manufacture thereof. For this interest in the license and profits he paid Baker \$6000. This money he raised by temporary loans, which he subsequently in the same year paid with that amount raised on a mortgage, given by him to Carpenter Howell, upon the farm in question. On the 9th of June, 1866, an agreement in writing was signed by Baker and delivered to John S. Carpenter, by which the former acknowledged the receipt of the \$6000, and in consideration thereof covenanted that he would assign and pay over to the latter, one-half of his interest (one-sixth) in the profits of a co-partnership business for the manufacture of the metal, then carried on by him and Alfred L. Hovey. The mortgage to Carpenter Howell, appears to have been given prior to the 8th of November, 1866. It does not appear that John S. Carpenter contracted any further debts or liabilities in the business, until some time in the winter of 1867, when the co-partnership above alluded to, having come to an end, Baker proposed to him to enter into co-partnership with him in the manufacture of the metal, the business to be carried on at Jersey City, to which Carpenter agreed. They entered into co-partnership, accordingly, and carried on the business, Carpenter contributing to the capital, money which he, from time to time, obtained by discounts from the First

Carpenter v. Carpenter.

National Bank of Warwick, on his promissory notes, endorsed by James A. Thompson, the brother of his wife, until in the spring of 1869, he was indebted to the bank for such discounts, to the amount of about \$7000. For the payment of this money, the bank was anxious. About that time, Thompson proposed to him that he should divide the liability which he, Thompson, had incurred for him, by getting his brother, the complainant, to endorse his, John S. Carpenter's, note for one-half of the amount of the indebtedness, while Thompson would remain liable for the other half. Approving of the proposition, John S. Carpenter proceeded to get his brother's endorsement, and on the 20th of March 1869, went with his wife, for that purpose, to the house of the latter, in Orange county, in the state of New York, and there, by dint of persuasion, obtained the desired accommodation, and induced the complainant to make a joint note with him for \$3500, payable at six months, to the order of Thompson, to whom John S. Carpenter delivered it. This note was not paid by John S. Carpenter at its maturity. Thompson sued the complainant upon it, and obtained judgment, which the latter was compelled to pay. He then brought suit against John S. Carpenter, for the amount of the note and interest, and recovered the judgment above stated.

The conveyances by which John S. Carpenter conveyed his farm to his wife, were wholly voluntary. Although he alleges in his testimony, that there was a consideration, that he got \$6000 for the property, yet it appears that there was, in fact, none. His explanation of his testimony on this point is, that the \$6000 were paid by the assumption by his wife of the mortgage for that amount, which was on the property when the conveyance to her was made. The wife of John S. Carpenter, in the answer, states that no money was paid by her to her husband on the conveyance, and that it was not agreed or intended that there should be any. The answer, indeed, states that the property was principally the result of the joint industry and toil of the defendants, during a great many years in the farming business, and that, when they

Carpenter v. Carpenter.

commenced their married life, the husband had only about \$3000, and that the wife had about \$1000, which she had received from her father's estate, and which she placed in her husband's hands, and that that was all the capital on which they commenced business, and all they ever had, except what they made by their farming operations, but it does not set up this money and her services as the consideration for the conveyance. And if they had been set up, they would not have availed the defendants to sustain the deed as against the complainant. It appears by her husband's testimony, that of the money she received from her father's estate, about \$300 or \$400 were received very soon after they were married, and were expended in furniture and fixtures for the house on the farm, when they first built and moved into it, which was about forty-two years ago. Of the remainder, about \$200 were got about ten years thereafter. This money was used to pay for buildings put on the farm, a cow-house, grain-house, &c., and the residue \$600, was received afterwards, and was used in paying indebtedness on the farm, the title of which was then in the husband's name. Her services were rendered in the course of the discharge of her duty as a wife. Neither they, nor the money she brought to her husband, would have constituted a valid consideration as against her husband's creditors. *Skillman v. Skillman*, 2 Beas. 403; *Belford v. Crane*, 1 C. E. Green 265; *Cramer v. Reford*, 2 C. E. Green 367; *Annin v. Annin*, 9 C. E. Green 184.

The husband in his testimony, states that the object of the transfer of the farm to his wife, was that it was better for him to have the money than the farm; that he got \$6000 for the transfer of the farm; that he got the money from Carpenter Howell, that is, that his wife was to pay the \$6000 mortgage he had given to Howell on the farm; that she took the title subject to the payment of that mortgage; that he was not urged by his wife to transfer the farm to her before he did it; that he consulted her about it before he did it; that she wanted the farm, and he was satisfied to take the \$6000 for it. He adds, that he does not remember that anything was

Carpenter v. Carpenter.


said about saving the farm for his wife and children ; that his wife was dissatisfied about his engaging in the metal business ; he supposes she thought he might lose money in it ; that she supposed farming was good enough. He further says that he transferred the stock and farming fixtures to her ; that it was all in the same contract, and for the stock he had the proceeds of the farm, (meaning, he says, the proceeds of the farm after it was conveyed to his wife,) and got the money out of them. The answer treats the conveyance as wholly voluntary. The wife, answering for herself, says that she was not, at the time of the conveyance, informed by her husband of the exact nature of the purchase he had made of Baker, or the amount he had agreed to pay therefor, but that she understood and believed, at the time, that he had purchased some interest in a patent-right, out of which he claimed he would make a large sum of money, and that she ascertained that he was using large sums of money to pay for that interest, and she and her children became alarmed on account of his transactions, and feared that he would be drawn into other speculations, by which the property which he then owned would be wasted ; that she had no confidence in the value of the purchase which he had made, so far as she knew the nature of it, though he was apparently well satisfied with it, and seemed to think he would realize large profits from it ; that she and her children and friends consulted together about the matter, and concluded that they would, if possible, get him to convey the property to her, so that he would not make any further investments of the kind that she supposed and believed that he had made. She further says, her sole purpose was to prevent her husband from going further into speculation, and to save the property to herself and children by preventing him from making any further purchases of that character ; that she got her brother James A. Thompson, who had been the principal endorser for her husband, to speak to him about making the transfer, and that her husband at once expressed his willingness to do so, and very soon afterwards they went to Newton and the

Carpenter v. Carpenter.

transfer was made. The husband, answering for himself on this subject, says, that he transferred the title to his wife to quiet her fears, and satisfy her and his children, and not with any intention or purpose to cheat or defraud any person, and with no intention or expectation of creating any future indebtedness, or contracting any future liability. In his testimony, it will have been observed, he takes different grounds, alleging that he sold the farm to his wife; that she did not urge him to convey it to her, that she wanted the farm, and he was satisfied to take \$6000 for it; and he adds, that he does not remember that there was anything said about saving the property for his wife and children. The daughter, to whom the conveyance was made for the purpose of conveying the property to her mother, testifies that her uncle, James A. Thompson, was the first one, and she believes the only one, who suggested to her father the transfer of the farm to her, and from her to her mother, and she says she does not believe he gave any reason for it; that she never heard of any.

She further says, that her mother and the children never, to her knowledge, asked her father to make the transfer, nor did her mother, to her knowledge; that the witness was spoken to about the transfer by her father, not over a month before it took place, and that he then said that her mother was so dissatisfied, he was going to do it to satisfy her mind, because she found a great deal of fault with him because he had expended the \$6000. Her father, she says, had, at the time, other speculations in anticipation, to all of which her mother was opposed. She says, that the object of the transfer (which was of the farm and all his personal property there, the latter valued by him at \$3000,) was, as she understood it, to prevent her father from making any more purchases of patent rights, lands or anything else; that she understood that this transfer would prevent her father from making any more purchases, because they thought he would not use the profits of the farm when he did not have control of it; that he would not listen to them before, and they

Carpenter v. Carpenter.



thought after that he could be compelled ; that her mother said she did not know anything about these speculations, and did not want to know anything about them. She says her mother took a dislike to Baker, and said, not a cent of her property should go to Jersey City ; that her husband could take his part and do what he had a mind to do with it ; hers she was going to keep on the farm. John S. Carpenter testifies, that he first talked about transferring the farm, about a month before he did it, and that Thompson first suggested it to him. It is evident from the testimony, that the object of the conveyance was to protect the property of John S. Carpenter against his creditors, to put it beyond the reach of the creditors with whom it was contemplated he would probably contract debts in the hazardous business in which he was engaged, or in those on which he would probably enter. He says in his testimony, that he commenced the business with Baker in 1866, and continued in it from May of that year, until the latter part of the winter of 1867, and that in the latter part of April or first of May of that year, he engaged in the business in Jersey City ; that before that, the business had been carried on in Williamsburgh, and it was a mere removal from the latter place to Jersey City ; that he and Baker had got the business themselves and removed it to Jersey City, and that it was an enlargement of the business. So that when he made the conveyance to his wife, he was carrying on the business in Williamsburgh, and he continued in it from thence up to the latter part of April, 1869, about a month after he obtained the complainant's signature to the note.

The transfer, as before remarked, included not only the farm, but all his personal property there, valued by him at \$3000. So that he conveyed to his wife, all his personal and real property, except that which he had invested in the hazardous enterprise in which he was engaged. The evidence leads to the conclusion, that this transfer was made with a view to his future indebtedness, and to protect his property against it. But there is another important consideration in

Carpenter v. Carpenter.

the case. When the note was signed by the complainant, he was unaware of the fact of this conveyance. John S. Carpenter and his wife, went together from the farm in Sussex, to the house of the complainant, in the state of New York. The object of this visit was to obtain the signature of the latter to a note for one-half of the indebtedness for which Thompson was alone bound as surety for John S. Carpenter. The proposition that this should be done, came from Thompson. By this means, he proposed to devolve half of the burden he had assumed, on the complainant. The condition of John S. Carpenter's affairs had become desperate. The bank was urging payment, and in fact, according to John S. Carpenter's testimony, he abandoned the business in about a month from the time he obtained his brother's signature to the note. It proved a total failure. It is not probable that his wife was not fully aware of the object of her husband in this visit to his brother. Nor is it probable that she was not aware of the fact that the complainant made and signed the note. Her husband says, she was present when the note was drawn and signed. The complainant and his wife both swear that she was there, and in a position to hear the conversation which took place in regard to it. There was no secrecy in the matter. Her husband was urging the complainant to make the note, and he was reluctant to do so and declined, but finally appealed to his wife, and she, with reluctance, gave her consent that he should sign it. The wife of John S. Carpenter must have heard the representations made by her husband to the complainant, in regard to his pecuniary ability. Among these was the statement that his property at home, meaning the farm in question, was worth twice as much as the amount of all his debts. Both the complainant and his wife swear that this was said by John S. Carpenter to the complainant, in the presence of the wife of the former.

It is clear that the complainant had no actual knowledge at that time, nor until long afterwards, of the conveyance which had been made, nor had he any suspicion when he signed the note, that John S. Carpenter was not still the

 Fowler v. Colt.

owner of the farm. Had he known of, or suspected the conveyance, he would not have signed the note.

John S. Carpenter, after the conveyance to his wife, remained in possession of the farm and personal property, just as before that transaction, continuing to exercise the same acts of absolute ownership over them as before.

There must be a decree for the complainant. The conveyance from John S. Carpenter and his wife, to his daughter, Susan Carpenter, and the deed from her to her mother, Mary Ann Carpenter, will be declared fraudulent and void, as against the complainant's judgment.

 FOWLER and wife vs. COLT and others.

1. A statement made by a testator, estimating the amount of his estate with reference to his will and the disposition of it therein made, is inadmissible to show at what rate interest should be charged against the estate upon a legacy given by the will.

2. Where it is the duty of executors to separate a legacy from the estate within a reasonable time, and to invest it with a view to accumulation and the necessities of the support and education of the legatee, their neglect of such duty makes them chargeable with interest at the legal rate, for the time being.

3. Where testator's whole estate was vested at his death in a certain stock, of which he held the whole, in ascertaining the interest due upon a pecuniary legacy given by the will, the amount of which legacy has not been separated, as it should have been, from the estate, the dividends which have been, during all the time for which interest is to be ascertained, irregular and desultory, not based on the earnings of the company, and are no evidence of the income from the shares, are no guide as to the rate of interest to be charged, but interest should, in such case, be calculated at the legal rate from time to time, during the period required.

4. The omission of executors to invest a legacy as intended by the testator, will not be excused by the fact that it was for the interest of the residuary legatees, that the legacy should not be separated from the estate so long as it could be avoided.

Fowler v. Colt.

On exceptions to master's report, made on petition of Edward Salisbury and Maria Theresa, his wife.

Mr. William Pennington, Mr. Ashbel Green, and Mr. Williamson, for exceptant.

Mr. R. Wayne Parker and Mr. Cortlandt Parker, contra.

THE CHANCELLOR.

On the 15th of September, 1868, an interlocutory decree was made in this cause, whereby, among other things, it was ordered and decreed, that the surviving executor of the last will and testament of Roswell L. Colt, deceased, should take assignments of certain bonds and mortgages, in the decree mentioned and set forth, guaranteed by the Society for Establishing Useful Manufactures, to them as trustees for Roswell L. Colt, junior, and his sister, Maria Theresa, and that the executor should hold the bonds, as trustee, for the benefit of Roswell L. Colt, junior, and his sister, Maria Theresa, subject to the trusts created for them by the will of Roswell L. Colt and the codicil thereto, and that the surviving executor should be discharged, as such executor, from all claim or liability on account of the same. When this decree was made, Maria Theresa, who had then intermarried with Edward Salisbury, resided out of the United States. It was based on a report, made by a master on the hearing, before whom Mrs. Salisbury, who was then a minor, was represented by the solicitor of her guardian *ad litem*.

On the 4th of December, 1872, Mr. Salisbury and his wife, filed their petition in this suit, setting forth these circumstances, and insisting that the report and decree were founded on mistake as to Mrs. Salisbury's rights, and praying that the decree might be reviewed and set aside, and that it might be referred to a master of this court to take and state an account of the principal and interest due her upon her legacy, charging her with payments theretofore made, but crediting her with all commissions with which she had been charged in

Fowler v. Colt.

the account by the executors. The legacy referred to in the petition, is one of \$20,000, given to Mrs. Salisbury in the codicil above mentioned. The surviving executor answered the petition, admitting the truth of its statements, and joining in the prayer for an account of Mrs. Salisbury's legacy and the accumulations thereon, but insisting on the *bona fides* and fairness of the decree and of the account on which it was based, and that his accounts, as executor, had been fairly made and were conclusive and binding on the petitioners, unless impeached; but submitting it to this court to determine whether those accounts should be re-stated, and expressing willingness to acquiesce in the decision. On this petition and answer, an order was made on the 18th of March, 1872, vacating and setting aside the decree of September 15th, 1868, and referring it to one of the special masters of this court to take and state an account of the amount due to Mrs. Salisbury for principal and interest on her legacy; and directing him to allow her interest, after the rate of seven per centum per annum, for all the time during which the executors of Roswell L. Colt, deceased, received interest at that rate, upon the money in their hands belonging to her, and for all other time after the rate allowed by law, at that time. He was further directed to credit the executors in the account, with all moneys paid by them for or to her, but not with any commissions, although theretofore charged by them. The special master reported, that as the estate of the testator was invested by him in the capital stock of the above mentioned society, and so continued to the date of his death; and as the legacy bequeathed to Mrs. Salisbury must be paid out of the proceeds of that stock belonging to the estate; and as the executors had received from the society dividends of which he states an account on the par value of their stock; they should be charged with interest on the legacy at six per cent. per annum for every year during which they received dividends on the stock at the rate of six per cent. or less, which were the years 1856, 1857, 1858, 1859, 1861 and 1862, and for all other years to the 15th day of March, 1866, and from

Fowler v. Colt.

thence to the date of this report (April 22d, 1873,) at the rate of seven per cent. per annum. The master disallowed certain payments, for which the executor claimed credit as having been made for the internal revenue tax assessed upon the legacy. To the report, the surviving executor excepted as follows: *First.* To the allowance of interest on the legacy and its accumulations at the rate of seven per cent. per annum, from November 22d, 1859, to November 22d, 1861, and from November 22d, 1862, to November 22d, 1866, the exceptant insisting that the master should only have allowed six per cent. during those periods. *Second.* To the charge of interest during those periods, at seven per cent., on the ground that the executors received, on their shares of the stock during those periods, dividends at the rate of \$7 per share, whereas it ought to have been only six per cent., because the executor of the testator received less than seven per cent. during those periods, on the value of the stock. *Third.* To the statement of the account with annual rests. *Fourth.* To the refusal to allow the payments made for internal revenue tax; and, *Fifth.* To the refusal to allow to the executor, commissions on the principal of the legacy.

This court, in *Fowler v. Colt*, 7 C. E. Green 44, 47, 49, upon exception to a master's report, made on petition of Roswell L. Colt, junior, in respect to his legacy under the codicil above mentioned, passed upon the very questions raised by the third and fifth exceptions, as to the propriety of stating the account with annual rests, and the right to commissions as against the legatee. The disposition there made of these questions is entirely satisfactory to me. Besides it may be remarked, that the order of reference in this case, expressly forbids the master to allow commissions. These two exceptions will be overruled.

The question raised by the second exception was also considered and decided in *Fowler v. Colt*, but not under such circumstances as to make that decision authoritative in this case. That question is whether, seeing that the stock is valued at \$300 per share, its par value being \$100, a dividend of the

Fowler v. Colt.

par value ought not to be regarded as a dividend on the stock at its true value, and therefore, in reality, only a dividend of one-third of its nominal amount; so that a dividend of six per cent. on the par value would really be one of only two per cent. on the true or market value. This distinction is urged because of the fact that the whole, or nearly all of the testator's estate was, at the time of his death, invested in the stock mentioned in the master's report, and it is deemed unjust to hold his estate to the payment of interest on the basis of the dividends received on the par value of the stock. A statement made by the testator, in which the amount of his estate is estimated with reference to his will and the disposition therein made, was introduced by the executor. In that estimate the stock is put down at \$300 per share, and appears to have constituted all of his large estate of over \$700,000, except real estate of the value of \$5000. This paper is inadmissible as evidence in this cause, on plain principles. *Leigh v. Savidge*, 1 *McCart*. 124. But if it were admitted, it would not affect the question now before me. The codicil directs that the executors and the survivors and survivor of them, and his executor or administrator, shall hold in trust, for the benefit of the testator's granddaughter, Maria Theresa Colt, the sum of \$20,000, to be paid to her when she shall arrive at the age of twenty-five years, with the increase thereon from accumulation. It further directs, that if she shall die before she arrives at that age, leaving lawful issue, the legacy, with the accumulation thereon, be paid to the legal guardians of such issue, for the use of such issue, to be divided among them according to the laws of New Jersey for the distribution of the estates of those dying intestate. But if she shall die before attaining to that age, without issue, the testator directs that the said sum of \$20,000, with the accumulation thereon, be added to his general estate, and be considered part and parcel thereof, and be divided into three shares, to go to his two sons and his daughter, or to their issue. He further ordered and directed, that after Maria Theresa should arrive at the age of eighteen years, or should marry, the whole

Fowler v. Colt.

early income of the \$20,000 be paid to her for her separate use and control, married or unmarried, until she should arrive at the age of twenty-five years, if she should live so long, and that in the meantime, she be well educated and supported out of the income she should derive from her father's estate, and from such part of the income from that "conditional" request as might be necessary. It will be seen that the testator's intention was that his executors should set apart for Maria Theresa, the sum of \$20,000 to be accumulated. He provided for supplementing her income from her father's estate, with so much of the income of the \$20,000 as might be necessary for her proper support up to the age of eighteen years, after which time, until she should attain to the age of twenty-five years, she was to have the whole income of the \$20,000.

Under the direction and provisions above stated, it was the duty of the executors to separate, within a reasonable time, the \$20,000 from the estate and put it at interest, with a view to accumulation, and the necessities of the support and education of the legatee. For aught that appears, they might have done this immediately after the death of the testator. The master seems to have considered that no investment was necessary, in view of the fact that the testator's whole estate was invested, at his death, in the stock, and he therefore, to a certain extent, treated the matter as if the investment had been directed by the will to be continued in that stock. It was argued by the counsel of the exceptant, that the executors were not required to withdraw the money from this investment, in which the testator himself had placed it. If this were conceded, it would not affect the conclusion at which I have arrived ; for, it is impossible, from the case as it stands before me, to determine what the income of the stock was during the period covered by the report. The dividends made cannot be regarded as evidence of the income. The exceptant testified before the master that the executors controlled the society practically, and drew from that body dividends as they needed them. In 1868, he says, they had to pay a large amount of legacies, somewhere about

Fowler v. Colt.

\$64,000, and they obtained the money by a dividend from the society. It is evident that the dividends are no guide to the earnings or profits. They cannot fairly be regarded as evidence of the income from the shares. As was said in *Fowler v. Colt*, they were irregular and desultory, not according to, or based on, the earnings of the society, but upon the necessities of the executors, and the testator's children. But, if the dividends be taken as evidence of the full net earnings or profits of the society, the master has strictly complied with the directions of the order of reference, as to all of the periods of time (from November 22d, 1859, to November 22d, 1861, and from November 22d, 1862, to November 22d, 1866,) mentioned in the first exception, with the exception of that in which the year 1862 is embraced; for, for the year 1860, the society paid a dividend of \$5 per share; for 1861, \$7; for 1863, \$7; for 1864, \$8; for 1865, \$10; and for 1866, \$17. In 1862, a dividend of less than seven per cent. was paid on the par value of the stock. The dividends amounted, in the aggregate, from 1857 to 1867, both inclusive, to \$86 per share, an average of about \$8 per share at the par value. In 1868, as has been stated, a dividend of over \$30 per share was paid, in order to pay legacies. It is obvious, then, that these dividends cannot be regarded as the interest received by the executors on the legacy of Mrs. Salisbury, within the meaning of the order of reference. Under the circumstances, the liability of the exceptant to the payment of interest, must be fixed without reference to the dividends.

The codicil directs that the executors and the survivors and survivor of them, and the executors and administrators of the survivor, hold certain sums of money in trust for Roswell L. Colt, Maria Theresa Colt, and Margaret O. Colt, the children of the testator's deceased son Roswell, viz., for Roswell L. Colt, \$40,000; for Mrs. Salisbury, \$20,000; and for Margaret O. Colt, \$20,000, on the trusts declared in the codicil, in respect to those moneys, and then directs that the residue of the estate be equally divided between the testator's three children, declaring it to be his intention to leave the

Fowler v. Colt.

residue of his estate to and among his said three children and their heirs, exclusive of the children of his deceased son Roswell. Roswell L. Colt, Mrs. Salisbury, and Margaret O. Colt, therefore, have no interest in the estate of the testator, beyond the legacies given to them. These legacies are pecuniary legacies ; they are not payable in stock. No direction is given as to the postponement of payment of them in the interest of the estate at large, nor is any such intention indicated by the will or codicil. The testator did not direct the executors to continue the investment he had made of this money. They were bound to separate these amounts from the estate and securely invest them within a reasonable time. They did not do so. As before remarked, it does not appear that it was not practicable for them to do it very soon after the death of the testator. It may have been, and probably was, for the interest of the residuary legatees, that this money should not be taken out of the estate until a late day, and it was probably for this reason that the separation and investment were not made. That, however, is no excuse for the neglect or omission of the executors in the premises. Their liability is fixed by the established principles governing such cases. Their unexcused failure to make such separation and investment, is a breach of their trust, for which they are chargeable with interest. *Perry on Trusts*, §§ 449, 453, 462, 465. They are, however, chargeable with interest only at the legal rate, for the time being, in the absence of special agreements. *Perry on Trusts*, § 468 ; *Gravers' Appeal*, 50 Penn. St. 189. They are, therefore, chargeable with interest, at the rate of six per centum per annum, up to the year 1866, in which, by statute of March 15th, interest at the rate of seven per cent. per annum was legalized as a common rate. The master erred in charging the executor with interest at seven per cent. during the periods mentioned in the first exception. The legal rate of interest, in the absence of special contract, then, was six per cent. ; and the executor should have been charged at that rate. The first exception must be sustained. The second exception will be overruled.

In the matter of Abram S. Hewitt.

It remains to consider the fourth exception, which is founded on the refusal of the master to allow the executor certain disbursements which he alleges he made on account of Mrs. Salisbury, for internal revenue taxes, from 1862 to 1869, both inclusive. There is no evidence before me as to these disbursements, except the receipts of the collector of internal revenue. None of them, except those for 1868 and 1869, appear to be for assessments in respect of Mrs. Salisbury's income from her legacy. The first of those is on an income of \$200, and the tax paid was \$10. The other was upon an income of \$190, and the tax paid, \$9. The others are for assessments against the executors or executor, and are for different amounts of tax, the amounts of income on which they were paid, varying from \$445 to \$32,678. I am unable to determine whether any part of the payments made by the executors for internal revenue tax, except as above stated, in the years 1868 and 1869, was made on account of Mrs. Salisbury's income. The fourth exception will be allowed, so far as the tax paid for 1868 and 1869 is concerned. The result is, the first and fourth exceptions are allowed. The rest are overruled.

In the matter of the application for an attachment against
ABRAM S. HEWITT, as for contempt.

1. The right of substitution or subrogation is a purely equitable one, and the extent to which it will be exercised must often depend upon circumstances. Whether it will be extended to the extreme point, so as to include all the rights of the creditor, must often depend on whether it is necessary to the protection of the surety that it should be so.

2. Where a surety, who was subrogated to the rights of a land owner to whom the former has been compelled to pay the debt of his principal for land taken by the principal, (a railroad company,) under the exercise of the right of eminent domain, applied to this court to enjoin the use of the company's road over the land—*Held*, that it was not necessary to his protection to prevent such use, there being nothing to be gained by him through

In the matter of Abram S. Hewitt.

such injunction; the company being insolvent and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public, merely by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure;

On motion for attachment.

Mr. John Linn, for the motion.

Mr. C. Parker, contra.

THE CHANCELLOR.

Julius H. Pratt and Henry C. Spaulding, having been, as bail in error, compelled to pay the amount of a certain verdict with costs, recovered by Samuel K. Benson and Henry K. Benson against The Montclair Railway Company, which at the time of such payment was, and still is, an insolvent corporation, were, by a decree of this court, subrogated to the rights of the plaintiffs in the premises. The verdict was recovered on an appeal by the Messrs. Benson from an award made under the charter of the company, for the value of a lot of land belonging to them, in the township of Bloomfield, in the county of Essex, and damages on condemnation of that property for the purposes of the railroad. By that decree, the sureties were subrogated to all the rights, equities, powers, and privileges of the Messrs. Benson in reference to the land and to the payment of the amount of the verdict and costs by the company; and the amount of the verdict, costs, and interest, with the costs of the proceedings for subrogation, were declared to be a lien on the land ahead of all encumbrances put upon it, or attempted to be put upon it by the company.

It was further ordered, that on due and legal service of notice of that decree, on the receivers of the company, and demand of the payment of the amount of the verdict, costs, and interest to Messrs. Pratt and Spaulding, or to said Samuel K. Benson and Henry K. Benson, unless the same be

In the matter of Abram S. Hewitt.

paid within ten days thereafter, the company and the receiver and all persons claiming by, from, through, or under them, should absolutely cease and desist from any and all use of the land and every part thereof, until said moneys should be fully paid and satisfied, or until the further order of this court to the contrary.

Mr. Hewitt, as receiver of The New York and Oswego Midland Railroad Company, was operating the road when this decree was obtained. He ceased to do so, however, on the 30th of March last, although a license was given to him by Messrs. Pratt and Spaulding to continue running all trains on the road up to the time of the sale of the road, and until further notice to the contrary, "without prejudice to the rights of Messrs. Pratt and Spaulding in any proceeding had" in this court. From the 1st of April last, to the 30th of July last, the use of the road for public travel ceased. The holders of the second mortgage bonds, previous to, and about the latter date, authorized Mr. Hewitt, as trustee under their mortgage, to operate the road on their account, and he accordingly, as such trustee, resumed the running of trains over the road. The road had then been sold by the receiver. Mr. Hewitt acted on the advice of counsel, in thus operating the road as trustee. He was advised that the prohibition of the decree did not extend to him in that capacity, and that as trustee, he might operate the road without becoming liable to the charge of violating the interdict of this court. A motion is now made for an attachment against him, as for contempt. It is, however, conceded by the counsel of Messrs. Pratt and Spaulding, that his conduct in the premises has not been such as to call for any animadversion on the part of the court, and the real purpose of this motion is understood to be to obtain the views of the court as to the right of the mortgagees to use the road, in view of the above prohibition. That the mortgagees have no greater right in the premises than the company itself, is obvious. The real question is, whether this court will, under the circumstances, deprive the public of the use of the road. The plea of public convenience, or even public necessity, of course, will not avail to deprive a citizen of his

In the matter of Abram S. Hewitt.

property, without just compensation. The question here, however, is not between the land owners and the company. The former have been paid for their property, and the mortgagees of the company have possession of it. The premises have been adapted to the purposes of the road. The track has been laid down upon it, and constitutes part of a continuous line. It is true that the payment was not made by the company, but by persons who were its sureties, but still the land owners have been paid. These sureties have, indeed, been subrogated to the land owners' rights in the premises, as equity they should have been. Their counsel properly insist that the right to exclude the company from the use of the property, until the compensation awarded shall have been received, is included in these rights. But the right of subrogation is a purely equitable one, and the extent to which it will be exercised, must often depend on circumstances. Whether it will be extended to the extremest point, so as to include all possible rights of the creditor, must often depend on whether it is necessary to the protection of the surety that it should be so. Here the debt has been declared to be a paramount lien on the land. In addition to this, the records of the court show that the claim of the land owners was put in in a foreclosure suit, now pending in this court, upon the first mortgage given by the company, and by an interlocutory decree in that suit, made in the month of May last, the right of the land owners is recognized as being paramount and prior to the mortgage. In the final decree, provision may be made for the sale of the land to pay the amount due to the sureties. The application of the sureties, on proceedings to that end, their lien would be enforced by decreeing the sale of the property to pay the amount due them. To prevent the use of the road by the public, under the provision now made for rating it, cannot legitimately be productive of any advance to the sureties. The amount due them is about \$8000. The company is insolvent. As to it, this means of coercion must be utterly ineffectual. It would probably be no more actual as against the second mortgagees, whose trustee is

Mettler v. Easton and Amboy Railroad Co.

now operating the road, not with the expectation of profit, for the bondholders under his mortgage made up and placed in his hands a guarantee fund, to meet the deficit which it is anticipated will exist between the expenses and the earnings, but to save the road, on a sale, from the depreciation to which the fact of its operation having been abandoned would probably subject it. As against the public, such coercion is not to be contemplated. The sureties will be protected in their claim, and it will be enforced, but under the circumstances, it is neither necessary, nor would it conduce to such protection and enforcement, that the trustee of the second mortgagees should be enjoined from the use now being made of the road.

METTLER *vs.* THE EASTON AND AMBOY RAILROAD
COMPANY.

1. Where land has been taken under the exercise of the right of eminent domain, and a question is pending in a court of law as to the amount of compensation to which the land owner is entitled, he will be protected in his constitutional right to possession of his property, until his compensation be ascertained and paid or tendered to him; and the company in whose favor the condemnation is made, will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing.

2. To secure the land owner in his constitutional right, and at the same time to spare the company unnecessary delay, the court will, on the latter paying the land owner so much of the compensation as is undisputed, and the costs of the suit in this court, and paying into court an amount sufficient to cover the disputed claim, to the end that the land owner may have the same if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land.

On motion to dissolve injunction.

Mr. J. G. Shipman and *Mr. T. N. McCarter*, for the motion.

Mr. J. F. Dumont, contra.

Mettler v. Easton and Amboy Railroad Co.

THE CHANCELLOR.

By the charter of the Easton and Amboy Railroad Company, it is provided that payment or tender of payment, of all damages for the occupancy of lands through which the railroad may be laid out, shall be made before the company, or any person under their direction or employ, shall enter upon or break ground, on any land taken by them for their road, except for the purpose of surveying and laying out the road, unless the consent of the owner or owners of such land be had and obtained. It is further provided, that in case the company and the land owner cannot agree for the purchase of the land, commissioners may be appointed to appraise the land and assess the damages, who are to make a just and equitable estimate or appraisement of the value of the land and assessment of the damages to be paid by the company for the land and damages. Their report is to be made in writing, under their hands and seals, or the hands and seals of any two of them, and to be filed within ten days after making their assessment and appraisement, together with a description of the premises, and their appointment and oaths or affirmations, in the clerk's office of the county in which the lands are situated, to remain on record therein. The charter declares that the report, or a copy thereof, certified by the clerk of the county, shall, at all times, be considered as plenary evidence of the right of the company, to have, hold, use, occupy and enjoy the land. It also provides, that in case of dissatisfaction on the part of the company or the land owner, with the report, application may be made to the Justices of the Supreme Court, at the next term after filing the report, and that that court shall have power, on good cause shown, to set the report aside and direct an issue for the trial of the controversy between the parties, and to order that a jury be struck, and a view of the premises had, and that the issue be tried at the next Circuit Court, to be holden in the county where the land is situated, upon the like notice and in the same manner as the other issues in the Supreme Court are tried, and that it shall be the duty of the jury to assess the

Mettler v. Easton and Amboy Railroad Co.

value of the land and the damages sustained, and if they find a greater sum than the commissioners awarded, in favor of the owner, judgment thereon with costs shall be entered against the company and execution awarded therefor; but if the jury shall be applied for by the owner, and shall find the same or a less sum than the company shall have offered, or the commissioners awarded, the costs shall be paid by the applicant, and either deducted from the sum found by the jury or execution awarded therefor, as the court shall direct. The charter further provides, that the application shall not prevent the company from taking the land on filing the report, the value and damages being first paid, or upon a refusal to receive the same upon tender thereof, or the owner being under any legal disability, the same being first paid into the Court of Chancery.

The defendants caused to be condemned for their road, a lot of land belonging to the complainant, in Phillipsburg. Being unable to agree with him as to the value of the property, commissioners were appointed, who awarded him for the value of the land and damages, \$4120. The whole of the complainant's land was taken, so that no damages were awarded to him for injury to remaining property. The damages were awarded in respect to the improvements, which consisted of a dwelling-house, &c., on the lot. The report was duly filed. Both parties applied to the Supreme Court, under the charter, and the report was set aside. A consolidation of the causes was ordered, and the issue was tried at the Warren Circuit, at the last April term. The jury found a verdict for \$1155, for the value of the land, and \$2765, for damages. By direction of the judge who presided at the trial, they found also, specially, the interest \$275.92, from the date of the award, May 31st, 1873, to the first day of the then next term of the Supreme Court. The sums found for the value of the land and damages, are together, \$200 less than the amount awarded by the commissioners. On the return of the *postea*, motion was made on behalf of the company, that judgment be entered for the value of the land and

Mettler v. Easton and Amboy Railroad Co.

damages only, as specially found by the jury, with deduction of the costs or an award of execution for the costs. The court did not, at that time, dispose of the application, but held it over for advisement till the next term, which will be held in November next. On the 14th of August last, the company, being desirous of occupying the land, tendered to the complainant the amount found by the jury, for the value of the land and damages only, which was refused. They thereupon paid the amount of the tender, into this court, and took possession of the land and laid thereon their construction track. The complainant filed his bill for an injunction in the premises, which was ordered. Motion is now made to dissolve the injunction for want of equity in the bill. I do not deem it necessary to pass upon the objection made to the location of the bill. All the facts in the case were admitted by the counsel on the argument, and there is no dispute or difference as to any of them. It will be far more satisfactory to dispose of the motion on the merits.

The report is, by the charter, made plenary evidence of the right of the company to have, hold, use, occupy, possess and enjoy the land, and the charter provides, that they may take possession accordingly, notwithstanding the application to

Supreme Court, on which the report may be set aside. The company claim that they have thus, by the report, obtained title, and that by the seventh section of the charter, they are entitled to possession, on payment of tender of "all damages for the occupancy" of the land, and they insist that they have actually and literally tendered to the complainant, damages for such occupancy. But they cannot obtain title to the complainant's land without making a just compensation, and he and they having failed to agree, such compensation is to be ascertained by the means provided in the charter, and on payment or tender of it when ascertained, the company will get title, and not until then. And, although the charter gives them the right to take possession, on paying or tendering damages for the occupancy, the term damages here used, signifies the value of the land and damages.

Mettler v. Easton and Amboy Railroad Co.

In *Browning v. Camden and Woodbury Railroad Company*, 3 *Green's Ch. R.* 47, judicial construction was put by this court on a section like the seventh section of this charter, and it was held that the term occupancy was used by the legislature to express all the right and interest which the company could acquire in the land, and that the company were not entitled to possession until they should have paid, or tendered the amount found by the commissioners, or in case of appeal, by the jury; in other words, all that the land owner was entitled to receive for his compensation for the condemnation. In that case, pending an appeal, the company tendered the amount awarded by the commissioners, which was refused, and they thereupon proceeded to take possession. An injunction was issued to restrain them, which the court, after argument, refused to dissolve.

In the case before me, the company, by their tender, have assumed that the amount due the complainant was the sum they tendered. Whether it was so or not, remains to be determined by the judgment of the Supreme Court. The complainant insists that the sum found for interest, is to be regarded as part of the damages. The jury were directed to find the interest, specially, probably in view of the question whether the complainant may not, by reason of the condemnation, be entitled to interest on the amount of the value and damages, from the time of condemnation, notwithstanding the fact that he has since then had possession of the premises. The condemnation deprived him of his full dominion over his property. From that time he could not sell, lease, or pledge it. At most, he could only occupy it until his compensation should have been fixed, and paid or tendered to him. He was entitled to such occupation, and could not be compelled to yield it until payment or tender of just compensation. If the complainant is entitled to the sum found for interest, it is as part of that compensation. If he is entitled to it, the tender was not sufficient. Until he shall have been adjudged not to be entitled to it, the company cannot obtain the right of possession by tender of part only of the amount.

Mettler v. Easton and Amboy Railroad Co.

and by the jury. They cannot be permitted to assume that the adjudication of the Supreme Court will be adverse to them. The judge directed the jury to find the interest, because the complainant might be lawfully entitled to receive

For the sake of convenience, and to save expense and trouble, he directed them to find it specially, so that if the complainant is entitled to it he may have it; and if not, it may be readily disallowed. Had he given no such direction, the amount would have made an undistinguishable part of the verdict. A grave question exists as to whether the complainant is entitled to it, or not. He cannot be required to waive his claim, nor to do any act by which he may seem to do so. The tender was insufficient. The suggestion that the pecuniary responsibility of the company is such as to remove all ground for apprehension as to the payment of the amount of the interest and costs if the complainant shall be adjudged to be entitled to them, cannot weigh with the court in disposing of the legal right of the company to take possession of the complainant's property, without first making just compensation to him therefor.

But there is another aspect to this case. There is no question or dispute between the parties, except as above stated. The company are in need of the land, for the purpose of constructing their road. They are willing, as shown by the tender, to pay the complainant the amount of the value and damages found by the jury, and they are also willing to pay him the interest and costs if he shall be adjudged to be entitled to them. They ought not to be unnecessarily impeded in the prosecution of their work, which is a matter of great public concern. Nor ought they to be compelled to pay the interest and costs before the complainant shall have been adjudged to be entitled to them. If they will pay into this court a sum sufficient to cover the interest and costs, to the end that it may be paid to the complainant if he shall be adjudged to be entitled to them, and also pay the complainant the costs of this suit, with the costs of an order for the pay-

 Railway Savings Institution v. Drake.

ment to him of the money deposited, and the per centage due the clerk on the deposit, the injunction will be dissolved otherwise the motion will be denied.

THE RAILWAY SAVINGS INSTITUTION vs. DRAKE AND LAING.

Bill of interpleader as to moneys deposited in bank by trustee in name of *cestui que trust*, and demanded by both. Expenses of trust directed to be paid to trustee, and balance to *cestui que trust*.

On final hearing on bill and answer.

Messrs. Stone and Jackson, for complainants.

Mr. T. H. Shafer, for defendant, Reuben Drake.

THE CHANCELLOR.

This is a bill of interpleader. In the year 1865, the defendant, Reuben Drake, deposited in the complainant's bank, a sum of money, in the name and to the credit of his grandson, Theodore C. Laing. This money was the proceeds of a promissory note, made by the father of Laing, and held by the wife of Drake at her decease, which took place in the year 1864. Shortly before her death, Drake's wife requested him to collect the amount of the note and pay it, with the interest which should accrue thereon, to Theodore C. Laing, when he should arrive at lawful age. To this disposition of the proceeds of the note, Drake consented, and promised his wife that her request should be strictly complied with. He accordingly, after her death, proceeded to collect the note, but found it necessary to bring suit for the purpose. To that end, he took out letters of administration upon her estate. After receiving the amount due on the note, he deposited it in the complainant's bank to the credit of Theodore C. Laing,

Rahway Savings Institution v. Drake.

ing into his own possession the book given to him by the complainants as the evidence of the deposit. He denies that he intended to put the money beyond his own control, or understood that he did so, by depositing it in the name of his grandson, but admits that he intended to secure the money to the latter, and he now expressly acknowledges the trust, but seeks to gain possession of the money, in order that, after paying the proper expenses of the trust, he may pay over the balance to his grandson, who is of full age. His account, as Administrator, has been settled in the Orphans Court of Middlesex county. Theodore C. Laing appears to have called to account there. On applying to the complainants for the deposit and its accumulations of interest, they refused to deliver them to him without Theodore C. Laing's consent, and he therefore brought suit against them for the money. The defendant alleges, and it is not denied, that Theodore C. Laing also, at the time of filing the bill, threatened to bring suit against the complainants for the money. The complainants filed a bill of interpleader against Drake and his grandson. Only the grandson alone has answered. The bill is taken as confessed, as against the grandson. The right of the complainants to require the defendants to interplead, is not disputed. Drake does not only raise no question as to the trust in favor of his grandson, but waiving all questions, declares his desire to pay over to the latter the balance which will remain, after deducting the expenses of the trust. These expenses consist entirely of the cost of the administration, amounting, as appears by the final account as settled in the Orphans Court, to \$64.14. He is entitled to have them. There will be a decree, that he receive out of the deposit and its accumulations which have been paid into court, the amount of those expenses as above stated, with his costs of this suit, and that the complainants' costs be paid out of the fund, and that, on Theodore C. Laing's executing to Drake a proper discharge, the balance be paid over to him.

Taylor v. La Bar.

TAYLOR vs. LA BAR and others.

1. E. D. L. & Co., carpenters, contracted on the 28th of March, 1872, with the mortgagor, to do the carpenter work for a house to be erected on the mortgaged premises. Complainant's mortgage was recorded on the 4th of April following. Operations for building the house were not commenced on the ground until after the mortgage had been recorded. E. D. L. & Co. claimed a lien for the amount due them for their work under their contract, and that it was prior to that of the mortgage, on the ground that they had commenced the building before the recording of the mortgage. The evidence was, that the only work they had done before the recording of the mortgage, was "marking on the rods the length and width of the window-frames," but the window-frames were not made until the 8th of April, four days after the recording of the mortgage. *Held*, that the mortgage was entitled to priority over the lien.

2. A mortgage recorded before the commencement of a building, and given to secure advances to be made to pay for the construction of the building, for the payment of which advances in installments the mortgagee bound himself by written agreement when the mortgage was given, is entitled to priority over a lien claimed under the mechanics' lien law, for work done in the construction of the building.

On final hearing on pleadings and proofs.

Mr. W. H. Morrow, for complainant.

Mr. Alward, for lien claimants.

THE CHANCELLOR.

The only question presented by the pleadings in this case is, whether the building, for work on which the defendants, Edward D. La Bar & Co., carpenters, and Jonas E. Wuchter, roofer, claim mechanics' liens, was commenced before the recording of the complainant's mortgage. The mortgage is dated April 1st, 1872, and was recorded on the 4th of the same month. It was given by George A. La Bar and wife to William F. Van Deventer, (by whom it was subsequently

Taylor v. La Bar.

ned to the complainant,) to secure advances which Van Deventer then, by written contract, agreed to make in installments to the mortgagor, to enable him to construct the building proposed to erect on the mortgaged premises. It was to secure the payment of \$4000, in one year from its date, interest at seven per cent. per annum. The first of the installments to be paid by Van Deventer under his agreement, was to be paid when the foundation of the building was up; second, when the building was raised; the third, when it was completed, and the last, when it was finished. These installments were duly paid. The lien claimants, Edward D. La Bar & Co., agreed to do the carpenter work for the building, and on the 1st of March, 1872, entered into a written contract with the mortgagor, accordingly. They insist that their work was commenced within a day or two after the contract was made. The evidence on that score, however, is far from satisfactory. The work which they claim to have done before the mortgage was recorded, consisted in "getting rods ready to start the window-frames," and "in marking on the rods the length and width of the window-frames." This is said to have been done "in the course of a day or so," after the agreement was made. The next work was making the window-frames, which was on the 8th of April. The next was the framing of the building, which was done in the latter part of April, 1st of May, and was the first work done on the ground. The mortgage was recorded on the 4th of April. The mortgagor testifies, and the fact is not disputed, that he began operations on the ground for building, shortly after the mortgage was recorded; that it might have been three days after, but that the foundations were commenced about a week after recording of the mortgage. The work done by Wuchter, was in slating the roof. It appears that some of the money paid by the mortgagee under his agreement, was appropriated to the payment of a prior mortgage on the premises, and part, not all of the rest of it, to payment for work and materials done and furnished in the construction of the building. The first section of the supplement of March 14th, 1863,

Van Deventer v. Stiger.

to the mechanics' lien law, (*Nix. Dig.* 581, § 66,) provides, that the sale under a special *scire facias*, authorized by the eleventh section of the original act, shall convey the estate of the owner in the lands and in the buildings, subject to all mortgages and other encumbrances, created and recorded or registered prior to the commencement of the building. The lien dates, not from the time of doing the work or furnishing the materials, but from the commencement of the building. *Pennock v. Hoover*, 5 *Rawle* 291; *Wells v. Canton Co.*, 3 *Md.* 234.

Under the circumstances of this case, the complainant's mortgage is entitled to priority over the lien claims, although the money secured by it was payable in installments, all of which were paid after the commencement of the building. The money was loaned to pay for the work and materials to be done and furnished in building the house, and the complainant was bound by his agreement to advance it. *Moroney's Appeal*, 24 *Penn.* 372.

On the hearing, it was insisted by the counsel of the lien claimants, that the latter are entitled to the benefit of the supplement of April 12th, 1864, to the "act against usury," in respect of premium alleged to have been paid by the mortgagor to Van Deventer. No such claim is made in the answers. They admit the making and recording of the mortgage, and merely claim priority for their liens, on the ground that the building was commenced before the mortgage was recorded.

VAN DEVENTER vs. STIGER and wife.

1. Final decree set aside and defendants let in to answer, on proof of surprise.

2. A complainant who holds a bond and mortgage given to him by the mortgagor, as collateral security merely, for a debt alleged to be due to him

Van Deventer v. Stiger.

in the latter, should, in proceedings for the foreclosure of the mortgage, pay his debt, and if it be less than the amount due on the mortgage, take a final decree for the amount of his debt and interest only.

On motion to set aside execution and final decree, and let the defendants to answer.

Mr. J. R. English and *Mr. B. Williamson*, for the motion.

Mr. W. J. Magie, contra.

THE CHANCELLOR.

The bill in this case was filed to foreclose a mortgage on land in Union county. The mortgage is dated March 12th, 1870, and was made by the defendants, Stiger and wife, to Theodore Y. Bainbridge, without consideration, but nominally, to secure the payment of \$2475, with interest. At Stiger's request, Bainbridge assigned it to the complainant, to indemnify the latter against his liability as endorser for the accommodation of Stiger on a promissory note for \$1000. That note, having been paid by Stiger, the bond, mortgage and assignment were, as he alleges, delivered up to him by the complainant. Stiger states that he was desirous of having the mortgage foreclosed, in order to clear the title of the mortgaged premises from liability to embarrassment, by reason of the transaction, subsequent to the giving of the mortgage, in which he had conveyed the property, but had afterwards rescinded the contract, taking no reconveyance, however, because he understood that the deed, which was by the terms of the rescission to be delivered up to him to be cancelled, had not been recorded. He subsequently discovered that it had been recorded. He alleges, that the complainant consented that the mortgage should be foreclosed in his name, to enable Stiger to accomplish this object, and that he was surprised to find, as he did, after the suit had been commenced, that the complainant insisted that there was something due

Van Deventer v. Stiger.

him from Stiger, for which the mortgage stood as security, by virtue of an alleged agreement between them. The complainant states that after the \$1000 were paid, he retained the bond, mortgage and assignment in his hands, under an agreement between him and Stiger, that they should stand as security to him for \$2400, due him from Stiger.

It appears clearly from the evidence, that the suit was instituted at Stiger's request, with, on his part, the design above stated; that subsequently, the claim which the complainant made under it, was wholly denied by Stiger, and that he and the complainant had two or three meetings on the subject of the alleged indebtedness, which was affirmed on the one side and wholly and strenuously denied on the other side; that at the last of these meetings, which was shortly before the final decree was entered, no conclusion was reached, Stiger proposing to endeavor to find some important papers of his relating to the business, which he had mislaid; that through the urgency of the complainant, his solicitor, without Stiger's knowledge of his intention to do so, proceeded to final decree and execution, and that Stiger first learned of this action on the part of the complainant, from the sheriff's advertisement of sale in the newspapers, and thereupon, without delay, applied to this court to open the decree. It also appears, that the complainant made no proof of his claim, but took a decree for the whole amount of the principal of the mortgage, with interest thereon, from the date of that instrument, March 12th, 1870, while the principal of his demand, according to his own statement, consisted of debts contracted in August and October, 1871, amounting in all, to \$2400, less by \$75 than the principal of the mortgage. So that, to say nothing of the objectionable frame of his bill, if he were entitled to the decree *pro confesso*, he is not entitled to the final decree which he has entered, for he should have caused an account to be taken of the amount due him on the claim, as collateral to which, as he alleges, he holds the mortgage in suit, and for the amount shown to be due to him by that account, he should have entered a decree and issued execution. Instead

Van Deventer v. Stiger.

of that, he has taken a decree and issued execution for the sum due according to the terms of the mortgage, an amount considerably greater than his demand, according to his own statement of it.

These facts are sufficient grounds for setting aside the execution and decree and letting the defendants in to answer.

There will be an order accordingly, with costs.

C A S E S

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY.

OCTOBER TERM, 1874.

PARKER'S EXECUTORS *vs.* MOORE and others.

1. A bequest of a sum of money generally, without distinguishing it from testator's other moneys, or mentioning out of what fund it is to be paid, is a general legacy. A designation of such bequest in the residuary clause as a "specific" legacy, will not change its character as general, where the term is evidently used by the testator with reference to the fact that it was a legacy of a specified sum of money.

2. Though, as a general rule, the gift of the interest of a fund, standing by itself, is a gift of the corpus, yet, if from the context of the will it appears that the interest only was intended for the legatee, the gift of the interest will not pass the principal.

3. A gift of \$50,000 to A, "the interest thereof to be paid to her during life," and the principal to her children at her decease, does not pass the corpus of the fund to A.

4. As between the tenant for life and the remainderman, the rule, at least as to funds that are not permanent, is, that what is not specifically given is to be converted into money, if the property and the parties are not abroad. In this case, the testator has directed the conversion.

5. Where there is a bequest of the income of a sum of money to one for life, and then the principal to another, without any trustee being named in the will other than the executor, he will be held to be trustee.

6. In this case, the court refused to appoint a married woman trustee of funds of which she was entitled to the interest for life, upon considerations of marital influence, domicil, and near relationship to the remaindermen.

Parker's Executors v. Moore.

When trustees are discharged from their trust under the will, several trustees will be appointed to take charge of different portions of the estate, or any reason it is necessary or desirable.

Isaac Brown Parker, late of Burlington, in this state, made last will and testament, dated August 18th, 1865, as follows :

“I, Isaac Brown Parker, of Burlington, New Jersey, being in reasonably good health, and of sound mind and memory, for which I desire to express my thankfulness to the giver of all good, do make this my last will and testament.

“*First.* I direct that all my just debts and funeral expenses be paid, and that the place of my interment be suitably marked, at the discretion of my executors.

“*Second.* It is my special desire to provide amply for the comfort and happiness of my dear wife, that, during the residue of her life, her residence may be where that comfort and happiness shall be most certainly promoted ; and I therefore, direct my executors hereinafter named, to invest safely, a sum which will produce an annual interest of five thousand dollars, (\$5000,) which shall be paid to her semi-annually ; at the decease of my dear wife, this investment to fall into the residue of my estate. I bequeath to her also, any part of my household plate, furniture or effects, which she may choose.

“*Third.* With the devises which I purpose hereinafter to make to my daughter, Mary, and the securities for the indebtedness of her husband, Johnston Moore, which are hereby cancelled, she shall be considered as having been advanced sixty thousand dollars, (\$60,000.) In addition thereto, I bequeath to her the sum of fifty thousand dollars, (\$50,000,) the interest of which shall be paid to her during her life, and the principal to her children at her decease. And I do hereby devise to my said daughter, Mary, the farm in and adjoining Carlisle, including all the lots which have been used and occupied as a part of it by her husband, and which contains about one hundred acres, be the same more or less ; also, the farm in Dickenson township, which I purchased from the

Parker's Executors v. Moore.

executors of Samuel Bertern, and which contains about one hundred and eight acres, and which is now in the tenure of her husband ; to have and to hold these same farms to my said daughter, for and during her life, with remainder in fee to her children.

“ *Fourth.* I have advanced to my daughter, Euphemia, which includes all the indebtedness of her husband, Edward B. Grubb, to me, thirty-six thousand dollars, (\$36,000.) In addition thereto, I bequeath to her fifty thousand dollars, (\$50,000,) the interest of which shall be paid to her during life, and the principal to her children at her decease.

“ *Fifth.* I have advanced to my son, John Brown Parker, twenty-five thousand dollars, (\$25,000.) In addition thereto, I bequeath to him the sum of sixty thousand dollars, (\$60,000.) And this shall be considered a settlement of all accounts between him and me.

“ *Sixth.* I have advanced to my son, William B. Parker, in his lifetime, a sum not exceeding one hundred thousand dollars. In addition thereto, I bequeath to each of his children, Henry, Maria, William and Stephen, the sum of twenty thousand dollars (\$20,000,) each, to be paid to them as they severally arrive at full age.

“ *Seventh.* I devise to my executors, hereinafter named, the farm in Burlington county, New Jersey, containing about one hundred and twenty-six acres, where my son, George W. Parker, now resides, and all the stock and farming utensils there, in trust, that they will have the same so managed, rented or conducted, as that they shall receive the rents, issues and profits thereof, and appropriate the same in such sums and at such times as will best comport with the necessities and comfort of my said son, George W. Parker ; and if this should not be sufficient for his support and maintenance, I direct my executors to appropriate out of my estate, the further sum of five hundred dollars annually, for that purpose. And I bequeath to his daughter, Mary, the sum of fifteen thousand dollars, to be paid to her when she comes of age. And I devise to his said daughter, Mary, the farm in Burlington

Parker's Executors v. Moore.

unity, which I have hereinbefore appropriated for the support of her father, in fee simple, to take effect at the decease of her father.

Eighth. I have advanced to my daughter, Emeline Weston, fifty thousand dollars, (\$50,000.) In addition thereto, I bequeath to her the sum of fifty thousand dollars, (\$50,000,) the interest of which to be paid to her during her life, and the principal to her children at her decease.

Ninth. I bequeath to my executors, hereinafter named, the sum of fifty thousand dollars, (\$50,000,) in trust, that they should invest the same, and pay the interest thereof, annually, to my son, Thomas B. Parker, during his life, and the principal to his children, at his decease, if he should then have any. If he have none, this bequest shall lapse into the residue of my estate, upon his decease; and I do hereby commit to the discretion of my said executors, the power and authority to advance any part of the principal to him, under circumstances in which they shall deem it proper to do so.

Tenth. I have advanced to my daughter, Marcia R. Freeman, the sum of forty thousand dollars (\$40,000.) In addition thereto, I bequeath to her the sum of fifty thousand dollars, the interest of which shall be paid to her during her life, and the principal to her children at her decease.

Eleventh. I have advanced to my daughter, Virginia Marie, the sum of fifty thousand dollars (\$50,000.) In addition thereto, I bequeath to her fifty thousand dollars, (\$50,000,) the interest whereof shall be paid to her during her life, and the principal to her children at her decease.

Twelfth. I devise to my grandson, Parker I. Moore, the land on which he now resides, in Penn township, Cumberland county, Penna., containing two hundred and forty acres, and to his heirs. And I charge the same with the payment of \$10,000, one-half the value thereof, to be paid to his mother, my daughter, Mary.

Thirteenth. To enable my executors to fully settle my estate and make the necessary investments, I give them full power and authority to sell, convey, and dispose of all, or any

Parker's Executors v. Moore.

part of my real estate in Pennsylvania or New Jersey; and if any of my legatees should desire to take any part of the same, they may do so at a valuation, to be made by three judicious men, to be appointed by my executors. And I empower my executors at any time, and at all times, to invest, or re-invest all such sums of money, as the exigencies of my estate shall require or render necessary.

“Fourteenth. As to all the rest and residue of my estate, real and personal, I desire that it shall be equally divided between my children, Mary Moore, Euphemia Grubb, John Brown Parker, Marcia Freeman, Thomas B. Parker, Virginia Marie, and Emeline Johnston, charging each of them with the advancements, as I have hereinbefore set them forth, as having been made by me to each of them. It being expressly to be understood, that the residuary bequests to my said children, Mary, Euphemia, Emeline, Thomas B., Marcia, and Virginia, are to them for life, remainder to their children after their death; and with the same conditions, trusts, and limitations, as are coupled with the specific legacies to each of them; and in this calculation, I allow to my daughter, Mary, \$2000, for the education of her daughter, and improvements on the Bertern farm; and if any of my said grandchildren should die intestate and without issue, before their mother, the share of such shall go to their surviving brothers and sisters, if they leave any; and if all said children be dead, at the death of the parent to whom the interest is payable, then the said legacy or legacies shall lapse into the residue of my estate.

“Sixteenth. I do hereby appoint my son, John Brown Parker, and Frederic Watts, Esq., of Carlisle, Pennsylvania to be the executors of this, my last will and testament, giving them all the powers and authority to sell and convey real estate, as hereinbefore provided; and I set apart, direct that they retain the sum of \$8000 as compensation to them as my executors; and it is my will that it be not required of them to give security for the execution of the will, and it will be necessary that the same be registered, both in

Parker's Executors v. Moore.

Jersey and Pennsylvania, I do not desire that security be required of them in either place, by the surrogate or register."

The testator died on or about September 19th, 1865. Both executors proved the will. On the 28th of May, 1872, they filed their bill, praying that an account might be taken, under the direction of this court, of the trust estates, and that, on paying over the interest and dividends due on the trusts, and the assets of which the estate is composed, they might be discharged from their trust, Mr. John Brown Parker on account of ill health, and Mr. Watts on the ground that the grossing duties of the public office which he holds—that of Commissioner of Agriculture of the United States—will not permit him to give any attention to the trust.

The answers consent to the relief prayed.

Mr. B. Gummere, for complainants.

Mr. C. Parker, for Mrs. Freeman.

Mr. J. Wilson, for Mrs. Grubb and Mrs. Moore.

THE CHANCELLOR.

The question presented for consideration is, whether the testator's daughters are entitled to possession of the corpus of the funds from which the interest bequeathed to them is to be derived, especially as to the legacies of specific sums of money. It is urged, that although, perhaps, a distinction may be made between the legacies given in the residuary section and those of specified sums, yet they are all specific. These legacies are not specific, but are all of them general. Those given by the sections other than the residuary, are legacies of specific sums of money, but they are general legacies, nevertheless. *Roper on Legacies* 202; *Sparrow v. Josselyn*, 16 Bear. 135. The testator evidently, in his designation of them in the residuary section as "specific" legacies, used the term with reference to the fact that they were legacies of specified sums of money. Such a reference will not give them

Parker's Executors v. Moore.

any other character than that which would otherwise have been given to them by the established rules of construction. The legacies given out of the residuum, are also general, and not specific. *Roper on Legacies* 242.

It is insisted on behalf of the daughters, that they are entitled to the funds from which the interest given to them is to be derived, subject only to the necessity of giving security to the persons in remainder, in case real ground of apprehension of waste of the corpus is shown to exist. To maintain this position, they rely on the language of the bequests. It appears to me, however, that the terms of those bequests lead to the contrary conclusion. The bequests of specific sums under consideration, are, it will have been observed, in substantially the same language. In the case of Mrs. Freeman, after stating the amount of advances made to the legatee, the testator says: "In addition thereto, I bequeath to her the sum of \$50,000, the interest of which shall be paid to her during her life, and the principal to her children at her decease." In the residuary section he says: "As to all the rest and residue of my estate, real and personal, I desire that it shall be equally divided between my children, Mary Moore, Euphemia Grubb, John Brown Parker, Marcia Freeman, Thomas B. Parker, Virginia, Marie, and Emeline Johnston, charging each of them with the advancements I have hereinbefore set forth as having been made by me to them; it being expressly to be understood that these residuary bequests to my said children, Mary, Euphemia, Emeline Thomas B., Marcia, and Virginia, are to them for life, remainder to their children, after their death, and with the same conditions, trusts, and limitations as are coupled with the specific legacies to each of them; and in this calculation I allow to my daughter Mary, \$2000 for education of her daughter, and improvements on the Bertern farm; and if any of my said grandchildren should die intestate, and without issue, before their mother, the share of such shall go to their surviving brothers and sisters, if they leave any, and if all the said children be dead at the death of the parent to whom

Parker's Executors v. Moore.

the interest is payable, then the said legacy or legacies shall pass into the residue of my estate." From the circumstance that these specific sums and the shares in the residuum are, by the terms of the will, given directly to those who are to have the interest of them, it is argued that the testator intended that they should have possession of the funds, and that the words "to be paid" are, in this connection, equivalent to the words "to go to," or "to be received by." But the language of the tenth section, "the interest of which shall be paid to her during her life, and the principal to her children at her decease," provides for payment in both cases, as well to Mrs. Freeman during her life, as to her children at her death. The language of the other bequests of specific sums is before remarked, substantially the same. The testator bequeathed to his son, Thomas B., a share of the residue by the same terms, and together with his other son and his daughters named in the residuary section. As to Thomas, by the ninth section, he makes the executors trustees of the \$50,000 given for his benefit in that section, bequeathing that money to them in trust for him. He, undoubtedly, did not mean that the share of Thomas in the residuum, notwithstanding the fact that it is to him, should indeed go to or be received by him, but manifestly, that it should, as he expressly says it shall, be held on the same "conditions, trusts, and limitations" as the \$50,000 mentioned in the ninth section. That the testator understood the word *paid* in the sections in which the legacies of specific sums are given to his daughters, intelligently, and with an appreciation of its exact signification, appears from the language employed in the residuary section. He there provides that if any of the children of the residuary legatees be dead at the death of the parent to whom "the interest is payable," &c. He had made no mention of the interest on the shares of the residuary legatees; he had merely said that these residuary legatees were to be to his children there named, for life, with remainder to their children after their death; and "with the same conditions, trusts and limitations are coupled with" the legacies of specific sums. The gift

Parker's Executors v. Moore.

of the interest of a sum of money does not pass the whole fund itself, if there are words used to confine it to a life estate. *Clough v. Wynne*, 2 Madd. 188, 439; *Roper on Legacies* 1476. Says Roper, p. 1478: "But, notwithstanding, as a general rule, the gift of interest and dividends standing by itself, is a gift of the corpus, yet, if, from the nature of the subject, or the context of the will, it appear that the produce or interest of the fund only was intended for the legatee, the gift of the interest will not pass the principal." Under this will these legatees to whom the interest is given for life, cannot claim the possession of the fund on the ground that the gift of the interest passes the principal. The construction put upon the sections under consideration by the Supreme Court of Pennsylvania, in *Parker's Appeal*, 61 Penn. 478, so far as it rests on the existence of the general rule above alluded to, cannot be maintained, for that rule is not applicable to these legacies. This case differs from *Rowe's Ex'rs v. White*, 1 C. E. Green 411, for there a legacy was given to the legatee, with a limitation over on a definite failure of issue. The ruling of this court in *Jones' Ex'rs v. Stites*, 4 C. E. Green 324, has been misapprehended in applying it to this case. It is insisted that the language of the court there, "when specific chattels or a specific sum of money are given for life, or absolutely, subject to a limitation upon the happening of a certain contingency, the chattels must be delivered, or the money paid to the legatee, and at his death, or upon the contingency, will go to the legatee in remainder," applied to this case, would give to the daughters the possession of the specified sums bequeathed by the will under consideration. But here, the specified sum is not given for life, but the interest of it only.

It is urged that the fact, that by the thirteenth section of the will it is provided that if any of the legatees should desire to take any part of the testator's real estate, in Pennsylvania or New Jersey, they may do so, at a valuation to be made by three judicious men to be appointed by the executors, is indicative of the testator's intention in reference to the

Parker's Executors v. Moore.

bequests, and shows that he intended that his daughters should possess the principal. This provision applies to all the legacies, and as applied to either those of specific sums or those given by the residuary section, it in no wise militates against the construction which I put upon the bequests. The persons who were to receive the interest of these legacies, might well be permitted, in the conversion of the estate, to select portions of the real estate, at a just valuation, to be held as investments of part of the corpus of the fund, and I think that was what the testator intended by the provision.

Again, it is urged that the fact, that the testator bequeathed only \$8000 to his executors, is evidence that he did not intend that they should be charged with the trust with which, by this construction, they would have been charged; a trust embracing very large sums of money and continuing probably for a very long period of time. The indication of the testator's intention to be drawn from this fact, would be slight at best, for he may have considered the compensation sufficient for all the service, which by this construction, might have been required of the executors. It will be observed, that he gives them \$8000, as compensation to them *as his executors*, and it may be that he considered, as he properly might, that their duties as executors, would terminate when their duty as trustees began, and that for their services as trustees, they would be entitled to pay out of the trust funds in their hands. It is clear that he did, in fact, contemplate that his executors would continue in charge of a portion of his estate, at least, for a considerable period of time, for he makes them trustees of his sons, George and Thomas, for the respective lives of those sons. He makes no further provision, however, for their compensation.

The provision in the thirteenth section of the will, empowering his executors "at any time and at all times, to invest or re-invest all such sums of money as the exigencies of" his "estate," (not the part of it only which he had placed in their hands as trustees for George and Thomas,) should "require or render necessary," is not without significance.

Parker's Executors v. Moore.

The power to vary securities, pre-supposes that the estate has been converted and invested. How could the testator have intended that his daughters should possess and control the respective legacies of which he gave them the interest, when he gave to the executors unlimited power to vary the securities in which his estate might be invested, at their discretion, according to the exigencies of the estate? The possession, control and management of the corpus of the legacies, are inconsistent with the power given to the executors to vary securities at their discretion. *Morgan v. Morgan*, 14 Bear. 72. This power, it will be observed, is in addition to the power given in the same section, to sell his real estate in this state and Pennsylvania, to enable the executors to fully settle the estate and make the necessary investments. The testator contemplated that his executors, after settling his estate, would invest it, and I have no doubt, that the necessary investments here mentioned, are the investments of the whole estate. The daughters of the testator are not entitled to possession either of the specific sums or of the shares of the residuum. *Jones' Ex'rs v. Stites*, *supra*; *Covenhoven v. Shuler*, 2 Paige 122; *Clark v. Clark*, 8 Paige 152. The duty of the court in reference to these legacies, as well those of specified sums as those given by the residuary section, is, to see to it that all parties in interest are protected. As between the tenant for life and the remainderman, the rule, at least as to funds that are not permanent, is, that what is not specifically given, is to be converted into money, if the property and the parties are not abroad. *Ward on Legacies* 304; *Holland v. Hughes*, 16 Ves. 111; *Howe v. Earl of Dartmouth*, 7 Ves. 137. In this case, the testator has himself directed the conversion, by the thirteenth section of the will. The executors would be held, under the will, to be trustees of the legacies. *Jones' Ex'rs v. Stites*. In Parker's Appeal, the court said, in reference to the very matter now under consideration: "Several English cases have been cited, and among them *Bush v. Allen*, 5 Mod. 63, and *South v. Allen*, *Id.* 101, in which trusts to executors are implied from provisions very

Parker's Executors v. Moore.

similar to the case in hand, and it is not improbable that we might feel ourselves impelled to imply such a trust in this and cases like it, were it not that the legatees for life are placed on the footing of trustees for those in remainder, in regard to the thing or the principal of the fund devised for life, by the forty-fourth section of the act of the 24th of February, 1834. That act requires legatees to give security in the Orphans Court having jurisdiction of the account of the executors, to protect the interest of those in remainder, before the executors shall deliver the property or pay over the money to the legatees for life; which security, like that of trustees by appointment, is liable to the supervision of the Orphans Court at all times."

In *Giddings v. Seward*, 16 N. Y. 365, there was a bequest to the testator's mother of "the sum of \$1200 and interest on the same, contained in a certain bond and mortgage" described in the will, with a subsequent provision, importing that the money was given to the mother for life, with a limitation over. It was held that the legacy was not a specific, but a demonstrative legacy, giving the income of the \$1200 for the life of the mother. The executor had delivered the bond and mortgage over to the mother, and it appeared that she subsequently executed a satisfaction piece of the mortgage. The court said: "It was never the intention of the testatrix, therefore, to give to her mother the principal of the sum bequeathed, but the income only, during her life. The executor and ultimate legatee became, by the provisions of the will, a trustee of the fund during the life of the first legatee. The latter, therefore, could have no right to collect the principal sum secured by the bond and mortgage, nor any power or control over it, except so far as she was invested with such control by the voluntary act of the executor. But as the interest of the fund would, when paid, belong exclusively to the legatee for life, the executor, by delivering the bond and mortgage to her, must be regarded as having authorized her to receive such interest as the same should become due. No such inference, however, can be

Parker's Executors v. Moore.

drawn as to the principal, which was not due, and which, in no event, would belong to the legatee for life. The mortgagor, therefore, had a right to pay the legatee for life, the interest upon the mortgage from time to time, as the same should become due, and to that extent the receipt would discharge him. Hence, although the acknowledgment of satisfaction, by the legatee for life, was entirely nugatory as to the principal of the mortgage, it nevertheless affords sufficient evidence of the payment of interest up to that time."

In *Dorr v. Wainwright*, 13 Pick. 328, 331, the court said: "Such being the nature of the gift, it falls within a rule now well settled, that a gift of a fund or a sum of money to one for life with remainder over, is a gift of the interest or income only to the first taker, and the fund itself is not to be paid to the legatee for life, but to be in the hands of a trustee. We also consider it to be now settled by a series of decisions in this commonwealth, that when a testator by his will, either in express terms or by legal implication, has given the income of a sum of money to one for life, and then the principal to another, and has not in terms placed it in trust with any trustee, other than the executor, it is the province and duty of the executor as such, to hold and invest the fund in some secure and productive stock, or at interest on good security, and to pay over the income, from time to time, within reasonable times, to the legatee for life, and at the decease of the legatee for life, to pay out the principal to the person then, by the will, entitled to it."

It is incumbent on the court to appoint a trustee or trustees in the premises. It is suggested that each of the daughters be appointed trustee of the money of which she is entitled to the interest. But the objections to this course are numerous. The court is not inclined to appoint a married woman trustee in such a case as this, because of the control which her husband will be likely to exercise over her in making or changing investments. Besides, these ladies are all domiciled out of this state. These considerations, added to the fact of their near relationship to the persons in remainder, lead me to seek

 Leaning v. Leaning.

ther persons as trustees. *Lewin on Trusts* 35, 40, 210, 574, '10; *Hill on Trustees*, 188; *Wilding v. Bolder*, 21 *Beav.* 222. The difficulty of obtaining a trustee or trustees who can give proper security for the whole of an estate so large as this, will probably make it necessary, and indeed, on some accounts, it will, perhaps, be desirable, that several trustees should be appointed to take charge of different portions of the estate. If so, that course will be adopted.

LEANING vs. LEANING.

In a suit for divorce on the ground of desertion, the facts and circumstances under which the desertion took place, and the reasons which caused or provoked it, if the same can be ascertained, should be reported by the master. A decree in such a case will not be granted when the only evidence of the alleged desertion is the oath of witnesses, that the defendant "deserted" the complainant.

On final hearing on bill and proofs, and report of special master.

Mr. H. Traphagen, for complainant.

THE CHANCELLOR.

This is a suit for divorce on the ground of desertion. The master has returned, with his report, testimony taken before him in support of the allegations of the bill, and has reported that in his opinion, the material facts relied on by the complainant are proved, and he recommends that the divorce prayed for be granted. The complainant was sworn as a witness in the cause. Neither she nor any of her witnesses testify to any of the circumstances of the alleged abandonment. She and they swear that the defendant "deserted" her. She, at least, knows the circumstances under which the

Macintosh v. Thurston.

alleged desertion took place, and she should have been called upon to state them. The 159th rule requires the master in such a suit as this, to examine into and report the facts and circumstances under which the desertion took place, and the reasons which caused or provoked it, if the same can be ascertained. The master has not complied with this rule in any respect. The report must be returned to him for further testimony on the point above referred to, and that he may make investigation and certify as required by the rule.

MACINTOSH vs. THURSTON and others.

1. A purchase money mortgage has preference over lien claims for work done and materials furnished in buildings and improvements put upon the mortgaged premises by the purchaser, between the execution of the contract of purchase and the conveyance, not only to the extent of the purchase money, but also for all advances made in accordance with the contract of purchase, for building the houses, improving the grounds, and paying taxes and municipal assessments. It does not affect the priority of the lien of the mortgage, that the property had been conveyed to another before the conveyance to such purchaser, and that the money was advanced by a third person.

2. The mortgage and deed being delivered simultaneously, the seizin of the purchaser was a merely transitory one, to which no lien could attach.

3. An agreement by the vendor, under contract of purchase, to furnish the vendee funds for the erection of buildings upon the premises, is not the consent intended by the fourth section of the mechanics' lien law.

4. But if it was such consent, and such consent need not be recorded, the lien in such case must be subject to all liens incurred by the purchaser, which by the contract were to be discharged of record before conveyance.

5. A lien will not attach to premises when the owner is not made party to the suit.

On final hearing.

Mr. J. W. Magie, for complainant.

Mr. A. Dutcher, for defendant, Graham.

Macintosh v. Thurston.

THE CHANCELLOR.

The only question raised in this cause, (which is submitted in a "state of the case" agreed upon,) is whether the complainant's mortgage is entitled to priority over the lien claim of Preston Graham. By an agreement made between Edgar Tucker, trustee, and Charles C. Thurston, dated June 24th, 1871, the former agreed to sell, and the latter to buy four lots of land therein described, situate in the city of Elizabeth, at a price of \$6000 for the lot on which the complainant's mortgage is, and \$2750 for each of the others; on these conditions Thurston was forthwith to commence the erection, on two of the lots, of a good and substantial dwelling-house, of a certain character and description agreed on between him and Tucker, and in conformity with plans made by an architect, and signed by the parties. To enable Thurston to erect and finish the houses, with the walks and the front and rear yards, Tucker agreed to lend him \$6000 towards the erection and finishing of the house on the lot described in the complainant's mortgage, and \$4200 towards the erection and finishing of each of the houses on the other lots. These moneys, which were to be paid only on a certificate of the architect that the work had been done in such manner as to entitle Thurston to them under the agreement, were to be paid in installments as the work progressed. It was further agreed, that when the houses, (with the walks and yards,) or any of them, should be completely finished, ready for occupation, and when a certificate of the architect should be produced to that effect, and when all taxes, assessments, and water rates, assessed or imposed upon the premises, or any part thereof, after the date of the agreement, should have been paid, and also the assessment which might be imposed or assessed for or on account of the wooden pavement then lately laid down in Newark avenue, and when all liens affecting the premises, or any part thereof, incurred by Thurston, should have been discharged of record, then Tucker should, on the execution and delivery of the bonds and mortgages thereafter mentioned, convey the premises by warranty deed, with the usual full

Macintosh v. Thurston.

covenants, free from all encumbrances. And it was further agreed, that to entitle Thurston to such deed, he should at the time of the delivery thereof, execute and deliver to Tucker, bonds and mortgages as follows: On the lot described in the complainant's mortgage, a mortgage for the payment of \$12,000, and on each of the other lots, a mortgage for the payment of \$6950, all of which were to bear date on the day of the delivery of the deeds of conveyance, and the money secured thereby was to be payable in one year, with interest at seven per cent. per annum. It was also stipulated that Tucker would, in the place of any and each of the above mentioned mortgages for \$6950, accept \$4500 in cash and a second mortgage on the premises for \$2450, the prior mortgage, however, not to exceed \$4500; and that, in the place of the mortgage for \$12,000, he would accept \$7000 in cash and a second mortgage for \$5000, payable as provided for the mortgage in lieu of which it was to be taken, and to contain the same covenants and conditions which it was agreed that that mortgage should contain; but the mortgage for \$5000 was to be subject to no other prior lien than a mortgage for \$7000. Tucker was to have interest at seven per cent. per annum, on the purchase money of the land and the advances. It was also agreed that Thurston should not sell, assign, or dispose of the agreement or his interest therein, without the written consent of Tucker first obtained, and that the latter should not be required to make the loans, or any part of them, or the deeds, to, or accept the bonds and mortgage of, any other party or parties, unless he should elect so to do. Thurston was forthwith to commence the erection of the houses, and to proceed with them without unnecessary delay, and furnish all materials, and completely erect and finish the buildings, with the walks and yards, on or before the 1st of February, 1872, as to the lot described in the complainant's mortgage, and as to the others, on or before the 1st of December, 1871. And in case the work of erecting the houses should, in the opinion of the architect, be unreasonably delayed, or in case Thurston should sell or assign his interest in or under the

Macintosh v. Thurston.

ement, without the written consent of Tucker, the latter
uld have the right, and he was thereby expressly author-
l and empowered, to sell the whole of the premises,
ether with the unfinished buildings thereon, at public auc-
n, to the highest bidder, giving to Thurston fifteen days'
ice, and advertising the property for the same period of
e in one of the public newspapers printed in Elizabeth.
cker was to be allowed to bid at such sale, and the sale
s to be a perpetual bar against any claim to be made by
urston, or any one claiming under him, for any of the
ildings or erections, and any claims under that agreement.
nd it was agreed that on such sale, Thurston would forth-
th quit and abandon the premises, and the agreement was
nceforth to cease and determine, except that, in case the
e should produce more than sufficient to pay the contract
ice of the lots and the loans which should then have been
ade, and interest, and expenses of insurance and costs of
le, the excess should be paid to Thurston; but if there
ould be any deficiency, the latter was to pay the amount of
on demand.

When this agreement was made, Tucker was not the owner
the property. He conveyed it to Charles W. Pleasants by
ed, dated May 15th, 1871, but not recorded till July 7th,
71.

By a contract dated July 10th, 1871, and filed on the 28th
y of that month, made between Thurston and Graham, the
ter agreed to do the carpenter work and painting and find
e materials therefor, of the house to be erected on the lot
scribed in the complainant's mortgage. The price to be
id him was \$6000. The work was begun immediately and
s nearly finished before the 1st of February, 1872, there
ing left unfinished then, only work to the amount of about
00, which was completed in about two months thereafter.
ere was extra work to the amount of \$36.09. So that the
ole amount due Graham was \$6036.09. On this, pay-
ents were made, leaving a balance of \$1586.09. For this
m he filed a claim of lien, on the 4th of September, 1872,

Macintosh v. Thurston.

on the premises described in the complainant's mortgage, against Thurston, as builder and owner. On the same day, a summons was issued. At the December Term, 1872, of the Union Circuit Court, a general and special judgment was entered in the suit, for \$1689.48.

Pleasants, on the 21st of March, 1872, conveyed the premises to Thurston by deed recorded on that day, but dated February 1st, 1872. Simultaneously with this conveyance, Thurston gave to the complainant his bond and mortgage on the premises, dated on the 1st of February, 1872, to secure the payment of \$6200 in one year, with interest at the rate of seven per cent. per annum. This mortgage was recorded on the 27th day of March, 1872. Thurston made a mortgage on the premises to the New York Life Insurance Company for \$8000, dated March 8th, 1872, which was recorded on the 21st of the same month. The latter mortgage and the complainant's mortgage were given to secure the purchase money of the property, and the money advanced under the agreement to Thurston to pay for building the house, and money advanced to pay city assessments upon the property. They were both delivered at the time of the delivery of the deed, which was on the 21st of March, 1872. By complainant's consent, the mortgage of the life insurance company became a lien prior to his mortgage. Graham insists that his claim of lien has priority over the complainant's mortgage.

The complainant's mortgage, to the extent of the amount of the purchase money of the land, \$6000, is unquestionably entitled to priority over the mechanic's lien. *National Bank of the Metropolis v. Sprague*, 5 C. E. Green 13; *Strong v. Van Deursen*, 8 C. E. Green 369; *Phillips on Mechanics Liens*, §§ 243, 248.

It covers also, advances to build the house on the mortgaged premises and to improve the grounds and to pay the taxes and municipal assessments which had been imposed and were liens upon the property. The only question between the parties is, whether as to these moneys, it is also entitled to priority.

Macintosh v. Thurston.

The taxes and assessments were, by law, encumbrances prior to any other lien. The advances were made under an agreement by which Thurston was to build a house on the premises, but by which it was also agreed, that no title to the property should pass to him, except subject to a lien for the payment of these advances. The equity which secures to a vendor his purchase money against a mechanic's lien for work done and materials furnished in building on the land before the mortgage for the purchase money was made, would protect also, and for the same reason, advances made by the vendor, under an express agreement that he shall be secured therefor by a mortgage on the premises to be delivered simultaneously with the deed, towards improvements put on the property by the vendee, with a view to becoming the owner of the premises. Nor is there any reason, unless one can be found in the demands of the lien law, for giving to the claim of the mechanic or materialman in such a case, priority over such a mortgage. As against the estate of Pleasants, who was the owner of the premises during the time covered by the lien claim and when the building was commenced, no lien is claimed. Neither Tucker nor Pleasants was a party to the lien claim or the suit thereon. As against the estate of Pleasants, the lien would not lie. *Babbitt v. Condon*, 3 Dutcher 54; *The Associates of the Jersey Company v. Davison*, 5 Dutcher 415; *Coddington v. Dry Dock Co.*, 2 Vroom 477. Thurston had no legal estate in the premises. He had an equitable title, but he could only have acquired the legal title in pursuance of it, by complying with the terms of the agreement under and by virtue of which his equitable title arose. He must have paid or secured, according to the stipulations of that instrument, the purchase money and the advances for building, with all interest. If Graham had, by means of his lien, acquired the title which Thurston had, he must have taken it subject to the same conditions. Nor will the legal estate which Thurston obtained by the conveyance from Pleasants be held to have attached to the equitable one which he held under the agreement before the

Macintosh v. Thurston.

conveyance, to the prejudice of the complainant's rights. The mortgage was delivered simultaneously with the deed of conveyance. The title did not vest in Thurston. Through him it passed to the complainant. He was seized for an instant only. He received and parted with the title at the same time, and was but the instrument of conveying it to the complainant. To such a merely transitory seizin no lien could attach. *National Bank of the Metropolis v. Sprague, supra*; *Griggs v. Smith*, 7 *Halsted* 22; *Chickering v. Lovejoy*, 13 *Mass.* 51; *Thaxter v. Williams*, 14 *Pick.* 49. Nor can it be claimed that Thurston was the "owner" of the premises by reason of the contract existing between him and Tucker to build the house. The agreement is not a consent within the meaning of the fourth section of the mechanics' lien law. If it were held to be such, it was not recorded, though it was acknowledged and filed. *Babbitt v. Condor, supra*; *Associates, &c., v. Davison, supra*. Who caused it to be filed, or for what purpose, or with what design it was filed, does not appear. If it be held that this instrument is such a consent in writing as is contemplated by the fourth section, and that such consent need not be recorded, the objection still remains, that the consent given by this instrument is of such a character as not to authorize any mechanic or materialman to do work or furnish materials upon it; for the agreement stipulates that there shall be no conveyance of the title until all liens incurred by Thurston shall be discharged of record. It provides also, for securing the advances of money by a mortgage to be given simultaneously with the deed of conveyance. The mechanic or materialman who should give credit to Thurston by reason of this instrument, would do so with full knowledge of the rights reserved and stipulations made by Tucker for his own protection. It is also to be borne in mind that the owner of the fee is not a party to this lien claim. In *Moroney's Appeal*, 24 *Penn.* 372, there was a mortgage in the common form, given to secure the payment of a bond for \$12,000, which bond was, in fact, given in consideration of a covenant

Macintosh v. Thurston.

the obligee to advance \$12,000 for the purpose of building the mortgaged land, the advances to be made in certain proportions, according to the progress of the buildings ; and it is held that it ranked as a lien for the amount loaned from the date of its record, and not from the date of the actual advances, and that it had priority over mechanics' liens incurred subsequently to the mortgage, though before all the advances were made, although the mortgagor, who had contracted to apply the money to the payment of the builders, did in part failed to do so. The language of the court, in that case, is appropriate to the case of the lien claimant here : " If the owners of these liens trusted Montgomery (the builder) without examining the state of the records, the law provides no relief from the consequences of their negligence, and morality does not demand that it shall ; and even charity will not allow it, at the expense of more careful men. If they had examined the records, then they found the lien of Cadwal-ler (the mortgagee) standing good against Montgomery, and honesty forbids them to cut it out for their profit. If they found it, and still trusted Montgomery without inquiry, when they agreed to trust him, even with a lien against him for \$12,000, and with no apparent means to pay them. If they made inquiries, then they learned that he would have \$2,000 in his hands to pay for the improvements he was making, and they trusted him that he would appropriate it properly."

There is no equity in giving Graham's lien priority over the complainant's mortgage, whether as to advances for building, or for taxes and assessments ; nor is he, by the provisions of the mechanics' lien law, entitled to such priority.

There will be a decree accordingly.

Persons v. Persons.

PERSONS vs. PERSONS.

1. The fact that part of the purchase money of land bought by and conveyed to a husband, was the earnings of the wife during coverture, gives her no claim against him or against the proceeds of sale of the property.

2. Whether a purchase in the name of a wife is a settlement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; but any antecedent or cotemporaneous acts or facts may be received, either to rebut or support the presumption.

2. Where a wife takes title to real estate in her own name, but purchases it with the money and as the agent of her husband, in the absence of any proof of settlement of the property upon her, there is a resulting trust in the husband's favor.

On final hearing on pleadings and proofs.

Mr. S. Tuttle, for complainant.

Mr. A. B. Woodruff, for defendant.

THE CHANCELLOR.

The bill in this cause is filed by James Persons against Harriet Persons, his wife, to compel a conveyance by her to him of two houses and lots of land in Paterson, which were conveyed to her by Jane Rogers and others, on the 1st of June, 1866, for the consideration, as expressed in the deed, of \$3500. At the time of the conveyance, there was only one house on the property. This was afterwards raised and repaired, and the other house built. Of the consideration, \$1000 were paid in cash on the delivery of the deed, and the rest, \$2500, was secured by the bond and mortgage of the complainant and defendant, (both of them having executed the bond as well as the mortgage,) payable on the 1st of December, 1866, with interest at seven per cent. per annum. Of the principal of this bond and mortgage, \$2150 were paid on the 3d of December, 1866; on the 11th of February, 1868, \$200 were

Persons v. Persons.

d on account of the balance of principal; on the 23d of
y, 1869, \$100 on the same account; and the residue, \$50,
paid on the 8th of March, 1870. The bill states that
parties were married on the 14th of June, 1842, and that
lived together from that date up to October 26th, 1872,
n the complainant was expelled by his wife from the
e they then occupied, being one of the two houses above
tioned; that at the time of, and previously to the con-
ance of the property in question by the deed above re-
ed to, he was possessed of a considerable sum of money in
own exclusive right, amounting to about \$5000, which he
accumulated during a long period of time, as a steward
ne employment of an officer in the East India Company
sia, before his marriage to the defendant, and partly from
profits of a farm which he, since then, owned and worked
Head's Basin, in the county of Passaic; that for some time
r to the purchase of the property in question, he had been
ed and solicited by the defendant and others, to buy it,
that being then very ill and infirm and unable to go
out or to attend to his own business, and being then well
vanced in years, of the age of seventy-eight years, he
ided to these requests and solicitations, and consented to
ke the purchase for the sum of \$3500; that confiding in
good intentions, honesty and integrity of his wife, who
much younger than he, and about forty-six years old, he
trusted to her the purchase of the property and obtaining
deed and paying the consideration money, and that for
t purpose, he furnished her with \$3500. The bill further
es that she proceeded with the negotiations for the pur-
se, and on the 1st of June, 1866, secretly and without his
nowledge, procured the deed to be made to her in fee sim-
; that she paid for the property entirely with, as he be-
es, the money which he furnished her for the purpose, and
ich belonged to him, and with which he entrusted her to
for it for him and to take the title in his name, but that
, taking advantage of his infirm and helpless condition,
cured the property to be conveyed to her, as in her own

Persons v. Persons.

right, in order to cheat and defraud him out of his money and property, and to secure to herself and her heirs, the whole of the property, with the right of present and future control over it. It further states that at the time of the purchase, she had no money or property of her own; that ever since their marriage, she had been entirely supported by him; that shortly after the purchase of the property, he moved with her into one of the houses and lived with her there until, as above mentioned, she expelled him therefrom, forcibly ejecting him from the premises and refusing to allow him to come into the house or to live with her, and refusing to care for him in any way, in his old age and infirmity; and that she then for the first time claimed that the property belonged to her exclusively, and that he had no control over it. The bill alleges that he then first learned that the deed for the premises had been made to her as grantee, and not to him, and that since that time he has been compelled to seek a home elsewhere, and dares not return to the house for fear of his wife and of certain other persons living there with her, and aiding and abetting her in her efforts to keep him out of the use and enjoyment of the property and to break up his home; that the household furniture in the house belongs to him, but that she retains possession of it and excludes him from the use of it; that he has no means of support, except from the houses and the income of certain money amounting to about \$30,000, which he from time to time has placed in her hands to take care of for him and for which she refuses to account, and that he is, by reason of his age and physical infirmity, unable to perform any manual labor or to do anything towards his own support; that of the two houses on the premises, the defendant occupies one and rents the other at about \$450 a year, and that she takes the rent to her own use, and refuses to pay it, or any part of it, to him. The bill alleges that he has requested her to join him in conveying the property to some third person, that it may be conveyed to him, and to pay him the rents and to abstain from further collection

Persons v. Persons.

eof, and that she absolutely refuses to comply with such test.

he answer admits the marriage and that the complainant defendant lived together as stated in the bill, but denies : he ceased to live with her for the reasons, or any of n, stated in the bill. It denies the statements of the bill o the possession by the complainant, previously to the 1st June, 1866, of a considerable sum of money in his own at, and that he had accumulated any considerable sum of ney, and that he, after their marriage, had ever earned considerable sum. It denies also, that the defendant r urged and solicited him to buy the property in question, claims that she bought it of her own accord, and as her n, in her own right, and with her own money, and with consent. It admits that when the purchase took place was old and infirm, but denies that he was so feeble as to unable to go about and attend to his business. It denies : she received any money from him with which to pay for property, or that the title was to be taken in his name, claims that the project of buying it was all her own, and she in no wise acted therein for him, and that the title , without concealment, taken by her in her own name. enies that she had no money of her own, but avers that y years before she came to this country she kept a laun- and made a considerable amount of money, and that e she came here she has always worked hard, both as a dress and keeper of a boarding-house, and in that way by her own industry had earned enough prior to the chase, not only to support herself and to contribute the test part of what was necessary to and was taken for the port of the complainant, but to accumulate the \$1000 she l on the delivery of the deed, and all she has since paid the property. It denies his statements as to expulsion a the house, and alleges her willingness to take care of ; claims that she owns the household furniture, and al- s that all the property the complainant has, or which she ws of his having, is \$400, which she says he lent on

Persons v. Persons.

mortgage, to one Deborah McKee, and denies his statement as to his having placed in the defendant's hands \$30,000. It admits that there are two houses on the property, in one of which she lives, and that she rents the other, which she says she built in 1872, with her own money, to various tenants, and claims a right to do so, for her own use; and it admits also that she refuses to convey the property to the complainant, or for his use, or to account to him for the rents, or to refrain from collecting them. The answer alleges that the complainant and defendant were married in England; that soon after the marriage took place they left that country and went to Van Diemen's Land; that there the defendant learned that the complainant had been married to another woman before his marriage to her, whom he then said he had left in Nauvoo among the Mormons; that she learned there that the complainant had been a convict in England, and had been transported for crime; that in consequence of these facts, she, being unable to learn whether his former wife was alive or not when the defendant was married to the complainant, and on account of the complainant's indecent language and vulgar conduct, she is unwilling longer to cohabit with him, but is willing to provide him with a room and to care for him; that since his marriage he has not earned enough to pay for his board and clothes; that when he and she were in Van Diemen's Land and in South Australia she earned by her laundry all the money they lived on there, and saved enough from her earnings to send £300 sterling to her parents, in England, and that it was a part of this money which she afterwards got and the complainant took to buy the farm at Mead's Basin, but that when the complainant took title for that property, he took it in his own name instead of hers, as he ought to have done. The answer further states that the complainant joined in the mortgage given for part of purchase money of the property in question in this suit, and knew from the statements therein, and was apprised by the officer who took his acknowledgment, that the title was taken by her; that in May,

Persons v. Persons.

2, he joined her in a mortgage on the property to the Person Savings Institution to secure the payment of \$1700, which the property was described as having been conveyed over, and in April of the same year he joined her in a mortgage to Alexander W. Rogers for \$300, on the property ; that on the 5th of November of the same year, she, owing more money to pay for the house she had built on the property, borrowed \$1400 of Isaiah Farthing, for which she gave him a mortgage on the premises in her own name, which the complainant refused to join.

The first question I shall consider is, who purchased the property in question in this suit, the complainant or the defendant ? That the former bought it, appears clear. He testifies that he was persuaded by his wife and others, among whom was Mrs. Alice Dobson, to purchase it ; that he was disposed to do so, but that, yielding to their solicitations, he concluded to buy it, and, to that end, had an interview

with Dr. Rogers, who was one of the owners of the property, and acted as agent for the sale of it. He circumstantially narrates the transaction ; says Dr. Rogers insisted on \$4000 as the price ; that he refused to give more than \$3500, which was at last accepted, and that \$50 were paid by the defendant, at his direction, to bind the bargain. Mrs. Dobson corroborates the complainant, both as to the purchase by him, and as to the fact that both the defendant and the witness believed the complainant to buy the property, and also to the financial condition of the complainant at the time ; all of which, the purchase of the complainant, the solicitation of the defendant and others, that he should buy the property, and the illness of the complainant at that time, are expressly and positively denied by the answer. The complainant's account of the transaction is this : " I was at William Dobson's, in Market street ; I was very ill ; my wife came there, and

William Dobson and my wife took me by the arm and led me out to back of the Association ; Dr. Rogers stood there ; a horse was tied to a post ; we all four stood together ; I asked Dr. Rogers what he wanted for that property on River

Persons v. Persons.

street ; he told me he wanted \$4000 for it ; I said, Doctor, take five hundred off, and then I can talk to you ; he said it was his mother's and sister's property, and he could not do anything more ; I told him I had no more to say about it then ; I asked my wife and Mrs. Dobson to lead me back again ; the Doctor said, when I was going to turn away from him, that I should have it ; I told him then, to get it surveyed ; there was about six feet of ground that he called his own property, up in the front, but it came out to nothing about half way down the lot ; he wanted \$100 for that, as my wife told me ; she had been down to him before that, as it appeared ; I told him I would not give it—I would give him fifty ; I told him to get it surveyed, and then I told my wife to give him \$50 to bind the bargain ; then I left him, and they took me up to Dobson's house again ; before I purchased it, she wanted me to buy it ; Mrs. Alice Dobson and Mr. William Dobson, her husband, persuaded me to buy it, and said it was a good property, and cheap ; I told them I did not like the situation where it was ; I did not like the property." Mrs. Dobson testifies as follows : " I went with Mr. and Mrs. Persons down into Broadway, and they were going up to see Dr. Rogers, and she saw Dr. Rogers coming in the carriage ; we stood somewheres by where McGrogan's fish market used to be at the time, in Broadway, and they both tried to make signs to Dr. Rogers to stop the wagon, but he did not stop till he got by the Association, and then Mrs. Persons went across ; I stood by Dr. Whiteley's office, and Mr. Persons went across, and they talked perhaps a quarter of an hour—it seemed to me to be a great while—and then when they came back, Mr. Persons said that he had told him to come down \$500, and he would talk to him ; he said he had given him \$50—I can't say positively—to bind the bargain, and he said he must have it surveyed." She says the complainant " was very poorly at the time, very poorly ; he was very feeble, couldn't get about at all, scarcely ; had to keep his bed the biggest part of the time." He was then staying at the witness' house. The defendant was up at

Persons v. Persons.

Mead's Basin, nursing an invalid lady. When asked as to why the complainant purchased the property, she answered: "Mrs. Persons wished to live there; Mr. Persons did not care to live there, but he bought it, I believe." On the subject of solicitation to purchase, she testifies that she told him it was good property, and if she were he, she would buy it, and if he did not, she would, if she had the means. She says he was opposed to buying the property, and that Mrs. Persons said a good deal to him in favor of buying it, and urged him to purchase it. Dr. Rogers testifies that he does not know that he met these parties (the complainant and defendant) at any time before meeting them one day in the street; that he was in his carriage, riding through Broadway, near the Association's mills, opposite the engine house, when he was stopped by Mr. and Mrs. Persons; that they were together, and that they referred to the information which he had already received of their desire to purchase. He adds that the terms there were finally agreed upon. There seems to be no room for doubt, that the agreement for the purchase of the property was made by the complainant, notwithstanding the defendant's denial contained in her answer.

The next question is, with whose money was the property paid for? The complainant says it was with his. The defendant, in her answer, (she was not sworn as a witness,) says it was with hers. She says in her answer, that "she denies that at the time of her purchase of said property she had no money of her own, and she avers that many years before she came to this country, she kept a laundry and made considerable money, and that since she came to this country, she has at all times worked very hard, both as a laundress and as the keeper of a boarding-house, and in this manner and by her own industry she had earned enough, previous to said purchase, not only to support herself and contribute the greatest portion of what was necessary to, and was taken for the support of the complainant, but to accumulate the \$1000 she paid at the time of said purchase, and all that she has paid on the same since said purchase." In another part of the answer

Persons v. Persons.

she says, that while the complainant and she were in Van Diemen's Land, and in Adelaide, in South Australia, to which they afterwards went, she earned by her laundry nearly all the money that they lived on, and saved enough from her earnings to send £300 sterling to her parents, in England, to keep for her, and that it was a part of this money that she afterwards got and the complainant took to buy the farm at Mead's Basin. She does not say where she had been accustomed to keep this money, with which she alleges she paid for the property in question in this suit, or how it was invested, or where it was when the property was purchased. Some of it she claims to have brought with her when she came to this country, which was in 1853. From the above statements of the answer, the inference is that the money with which she paid for the property in suit was not derived from the sale of the farm. She does not allege in the answer that the money with which she paid for the property, came from the farm, nor yet does she deny, except inferentially, as above suggested, that it was derived from that source. She denies that her husband had any considerable sum of money derived from the sale of the farm, or any other source, while it appears that he sold the farm for \$2200, and his stock and other personal property there for \$1800 or \$1900. She sets up no claim to this money, nor any part of it, except that she says, that part of the £300 above referred to, the complainant took to buy the farm. The fair inference from the answer is, that it was not the money derived from the sale of the farm and stock and other personal property there, with which the property in Paterson was paid for. That it was paid for with that money, however, seems very clear. She took that money into her possession when the farm and personal property were sold. Dr. Rogers testifies that he understood from the complainant and defendant, that the purchase money was to come, at least a great part of it, from the property which they held and occupied at Mead's Basin, but in whose name that property was held, he did not know; he understood, he says, it was held jointly. Robert Bridge, one

Persons v. Persons.

of the defendant's witnesses, testifies that he understood from her, that the money obtained from the sale of the farm went towards paying for the property in question in this suit. The complainant testifies that the money with which the property in suit was paid for, was his money, derived from the sale of the farm and stock and the personal property ; that the mortgage for part of the purchase money was made for six months, to become due when the purchase money of the farm should be paid. The mortgage was, in fact, made payable at six months from its date, and it appears by an endorsement on the bond, that on the 3d of December, 1866, at the end of the six months, \$2150 of the principal of the mortgage, (\$2500,) and \$87.50 interest were paid. If the defendant be regarded as denying, by her answer, that the money with which the Paterson property was paid for, came from the sale of the farm and stock and other personal property of the complainant, the evidence disproves her answer. If, on the other hand, she be regarded as admitting that the money came from that source, she cannot be considered to have furnished the money for the Paterson property. Again, if, as she claims, her husband took part of her money, the £300 above referred to, to pay for the farm, that would give her no claim to the proceeds of the sale of the farm. How much of her money he took, she does not say. At most, according to the answer, it was only part of the £300. He, however, swears that it was his own money, and not hers, with which he paid for that property. But if, indeed, part of the money with which the farm was paid for, was earned by her, as she says, by her labor during her coverture, she has no claim either against him, or against the property or proceeds thereof, for or in respect of it. She and her husband lived together from the time of their marriage up to October 26th, 1872. *Skillman v. Skillman*, 2 *Beas.* 403 ; *Belford v. Crane*, 1 *C. E. Green* 265 ; *Cramer v. Reford*, 2 *C. E. Green* 367 ; *Annin v. Annin*, 9 *C. E. Green* 184.

The remaining question is, whether, although the land was purchased by the complainant, and the purchase money paid

Persons v. Persons.

by him, the defendant is not still to be regarded as the absolute owner of the property. Whether a purchase in the name of a wife, is a settlement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement, but any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption. *Perry on Trusts*, §§ 147, 148; *Peer v. Peer*, 3 Stockt. 432; *Devoy v. Devoy*, 3 Jur. N. 79; *Stone v. Stone*, *Id.* 708; *Sidmouth v. Sidmouth*, 2 Bea. 447; *Christy v. Courtenay*, 13 Bea. 96; *Williams v. Williams*, 32 Bea. 370. The answer, it may be observed, does not put the defendant's case upon the ground of settlement, or of conveyance to the defendant by direction of the complainant. It says indeed, that the conveyance of the property was made to the defendant with the knowledge and consent of the complainant, but it wholly repudiates all agency or instrumentality on the part of the complainant in the transaction. It denies that he had any participation therein, except to execute, with his wife, the mortgage given for part of the purchase money. The complainant swears that he was not aware, until the time when his wife ejected him from the house, that she had taken the title to the property. It is urged on the other hand, that he must have known the fact at the time the conveyance was made to her, because the officer by whom his acknowledgment to the purchase money mortgage was taken, made known to him the contents thereof, and besides, he must have known from the subsequent mortgages executed by him with his wife, that she held the title to the property. I do not attach much weight to these considerations. The complainant is evidently an ignorant man. He is admittedly a very old one. At the time of executing the purchase money mortgage he was seventy-eight years of age, and when the others were executed he was eighty-four. Nor is there, in view of their character and the circumstances under which they were made, any more importance to be attached to the expressions testified to by James Van Emburgh as having been made by the complainant, recognizing the de-

Persons v. Persons.

defendant's ownership of the Paterson property. It appears that he had, by his will, given the property to his wife. She was, when the expressions were made, exercising just such dominion over it as was for their joint interest, and as was to be expected from the difference in their ages—he being very aged and infirm, and she in full vigor and of middle age.

The expressions testified to by Bridge and Hampshire to the same effect, appear to me to be of but little consequence. The evidence as to presumable knowledge on the part of the complainant, that the conveyance of the Paterson property was made to his wife, is by no means cogent, and it does not appear that he gave any directions that it should be so made. The recollection of the scrivener by whom the deed was drawn, is not clear on that point. It appears that he received his instructions to draw the deed from Dr. Rogers, who was one of the grantors. Dr. Rogers testifies on this head, that he has no recollection that the complainant told him to have the conveyance made to the defendant, and in answer to the question, "Do you know how the deed came to be made out to Harriet Persons?" he says: "I have an impression that something was said at that time about the feebleness of Mr. Persons' health, and the great uncertainty of his living long, and that the property at his death would go to Mrs. Persons; that it would save trouble to have the deed made in her name. These are my impressions." From whose conversation these impressions were derived he does not state, but it is by no means improbable that it was from that of the defendant. And if they arose from that of the complainant, they prove no intention of settling the property on the defendant to the exclusion of the complainant, but only to secure the property to the defendant after his death. But the defendant makes no allegation that the conveyance was made to her through any intention on the part of the complainant to give or secure the property to her. She claims the property as her own by reason of her own alleged purchase of it for herself, with her own separate estate, and for her own use.

Persons v. Persons.

The evidence shows, however, that it was in fact purchased by the complainant, and paid for with his money, and that the defendant, who acted in the matter as agent for him, holding and disbursing his money for it, took title for it in her own name. There is no pretence of any settlement of the property upon her. The conclusion follows, that there is a resulting trust in his favor. That his farm was sold for \$2200, in cash; that his stock and other personal property there brought \$1800 or \$1900, cash; that this money, in all about \$4000, went into the hands of the defendant as his agent, there seems to be no question. His brother and he both swear, that from 1853 he received from abroad, \$4300. The defendant has not seen fit to give her testimony in the cause, and has offered no denial of the complainant's statement, that the entire proceeds of the sale of his farm and stock and other personal property there went into her hands, and that she put it into the First National Bank of Paterson; nor has she shown what became of this money thus entrusted to her. She relies on proof of admissions made by the complainant, that she earned a considerable amount of money by her labor, but as before remarked, this was money to which he was, by law, entitled. The only money which she attempts to prove specifically as her separate estate is that which Robert Bridge, one of her witnesses, claims to have borrowed. This, however, was only \$500 in all, and it appears to have been, in fact, lent by the complainant; and, besides, it was, according to this witness' statement, money to which the complainant was, by law, entitled. Bridge testifies that she loaned him some money eight or nine years before the time when he testified in this suit, and that it was twelve months before the sale of the farm. But to the question, "Did you ever hear Mr. Persons say whether his wife Harriet had earned any money of her own, if so, what did he say on the subject?" he answered: "I have heard him say she had money; I borrowed some of him, not of him; I would like to tell you how it came; the money that I borrowed was actually from her—she give it to me."

Persons v. Persons.

He says he got this money from her hands, in the First National Bank in Paterson; he believes there were two sums—\$300 and \$200. It seems to me that it could not have been difficult for her to have shown that she had money on deposit at that time in her own name, in the bank referred to, if such was the case. She has not done so. I am inclined to think that the loan, if it was made, was, as the witness' testimony, in his answer above given, indicates, really by the complainant, but that the witness received the money from the hands of the defendant, and it seems very probable that the defendant is mistaken as to the time—that it was after, and not before, the sale of the farm. After first saying that the complainant or defendant did not say how the latter got this money which he so borrowed, or how it became the property of the defendant, he afterwards testifies that the complainant would say that the defendant got the money by keeping boarders on the farm, and managing that property, the complainant being too feeble for anything. It appears by the testimony of this witness, that after the conveyance of the Paterson property to the defendant, he went with her to New York, to draw from a bank there £40, which the complainant had there on deposit, and that they failed, because the signature purporting to be that of the complainant on the draft or order, was pronounced not to be genuine. From this it would seem that the statement made by Richard Hampshire, one of the defendant's witnesses, as to the penniless condition of the complainant while the latter was living on the Paterson property, and the witness was boarding there, is not worthy of credit. He says the complainant said he had nothing; that his wife had all; and the witness says the complainant would borrow a penny from him to buy tobacco, and for a contribution in church, because he did not like to ask his wife for it. According to Bridge, the complainant had, at that time, £40 on deposit in New York. The answer, besides, says, that the complainant has £90 which he loaned on mortgage, to Mrs. Deborah McKee. Mrs. McKee, however, was called for the defendant as a witness, and contra-

Persons v. Persons.

dicted the answer, by swearing that she did not borrow that money of, or owe it to, the complainant, but to the defendant, and that she received this money, which the defendant swears belonged to the complainant, from the defendant.

The defendant drove the complainant out of his house at night, there is reason to believe, with violence, giving him a dollar with which to provide himself with lodging at a tavern, and forbidding him to return. Since then he has been dependent upon charity for his subsistence. Her reason for her unwillingness to live with him, that she is doubtful whether, when he married her, he had not a wife living, is manifestly disingenuous, for she cohabited with him twenty years after she ascertained the fact of his former marriage, and she does not profess to have any new light or information on the subject; and her other reason, his alleged improper language and habits, is not sustained by any proof, but from the evidence in the cause appears to be unfounded. That the defendant has not been scrupulous in dealing with the complainant's rights, may be inferred from the fact that, when, in February, 1872, she made a will, she signed his name to it as if he had executed it with her, evidently for the purpose of validating it, though she does not even pretend to any authority for so doing. I see nothing in the defence set up in the answer, or in the evidence adduced on behalf of the defendant, to constrain me to withhold the decree of this court to restore to the complainant his property. The apparent exaggerations in his testimony, as to the amount of his property gained in Australia, and the improbable allegation in his bill as to the amount of money which he gave into the hands of his wife while they lived on the farm, may, without any great stretch of charity, be attributed to his extreme old age. They cannot affect those facts in the case which are clearly proved, and the conclusions which, on established principles of equity, result from them. I forbear to speak of the unsupported, and apparently utterly unfounded charge in the answer, that the complainant was a transported convict,

Cutting v. Dana.

missing this with the other scandals in the cause, as foreign to the issue between the parties.

There will be a decree for the complainant, in accordance with the views I have expressed.

CUTTING vs. DANA.

1. Though, in general, the Court of Chancery will not entertain a bill for specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law, yet, notwithstanding this general distinction between personal contracts for goods and contracts for lands, in some cases, equity will enforce contracts for personal property.

2. Where the complainant has not a clear, complete and adequate remedy at law, or where some other ingredient of equity jurisdiction is mixed up in the transaction, equity will interfere to decree specific performance of a contract for the sale of a debt.

3. An objection that the complainant has a complete and adequate remedy at law, comes too late at the hearing.

4. Although the court may, of its own accord, dismiss the bill when it appears on the hearing, that the complainant has a complete and adequate remedy at law, notwithstanding the objection was not taken in the pleadings, nor noticed in the argument, yet, under such circumstances, it is the duty of the court to retain the cause, provided it be competent to grant relief and have jurisdiction of the subject matter.

5. Where a party agrees to assign a claim, upon the delivery to him of certain notes by a certain day, and the notes are then tendered, the offer is thereby accepted and the contract complete. That acceptance is a sufficient legal consideration for the engagement. There is no want of mutuality in such a contract.

On final hearing on pleadings and proofs.

Mr. B. Gummere, for complainant.

Mr. Henry Young, for defendant.

Cutting v. Dana.

THE CHANCELLOR.

This suit is for specific performance of an agreement made May 24th, 1872, by the defendant with the complainant, by which the former agreed to assign to the latter a debt of \$2959.12, payable in gold, due from the firm of U. H. Dudley & Co. to the defendant. The bill also prays an injunction to restrain the defendant from assigning or parting with the note, which is the evidence of the debt, or from delivering it to any other person than the complainant, and to restrain the defendant from further prosecuting a suit at law, instituted by him in the Supreme Court of this state, on the note, against the debtors. The circumstances of the case are, that the firm of U. H. Dudley & Co., of the city of New York, failed in January, 1872. Their debts appear to have amounted to from \$260,000 to \$270,000. Among these was a debt of about \$32,000 due to the firm of Cutting & Co. of San Francisco, of which the complainant was a member. The complainant, on hearing of the failure, came from that city to New York to look after his claim. Dudley & Co. first proposed to pay fifty cents on the dollar of their debts, and attempted to make such composition. Having failed therein, they, on the recommendation of the complainant, called a meeting of their creditors, which was held in or about March, 1872. At that meeting, the complainant, with two other creditors of the firm of U. H. Dudley & Co., were appointed a committee to examine the affairs of the concern. They did so, and at a meeting of the creditors, held on or about the 20th of the same month of March, reported that the assets would not pay over from thirty-eight to forty per cent. At that meeting, several of the creditors present, urged the complainant to take the assets and pay twenty-five cents on a dollar of the debts. To this he consented, and endeavored to effect such settlement, but after trying for two months he abandoned the effort, finding it impossible to make the arrangement, because some of the creditors insisted on payment in full, and others on a per centage beyond the amount proposed. It was a substantive part of this arrangement, that the com-

Cutting v. Dana.

on was not to be binding on any of the creditors, unless they should accede to it. The complainant having announced to the other creditors, by means of a circular, his intention to effect this settlement, another meeting of the creditors was held at the Astor House, in the city of New York, on the 24th of May, 1872. At that meeting, the complainant stated, what he had communicated by the circular, his intention to effect the settlement, and the reasons of his failure in his first effort. Some of the creditors were desirous that he should accept of the undertaking, to which it appears he, after some discussion on the subject, replied only by a proposition to pay the claims of such of the creditors as would sell them to him at the rate of twenty-five per cent., and pay for them in notes of U. H. Dudley & Co., to be endorsed by the complainant's firm, and payable in six and twelve months from the date. This was agreed to, and the following agreement was drawn up and signed by all the creditors present, including the defendant, except one: "The undersigned, creditors of H. Cutting & Co. of New York, in consideration of one hundred dollars to each of us in hand paid, the receipt whereof is hereby acknowledged, hereby agree to assign and transfer to H. Cutting, their several claims against said U. H. Dudley & Co., on settlement therefor, by said Cutting, at the rate of twenty-five cents on the dollar, in six and twelve months, to be settled by notes of U. H. Dudley & Co., endorsed by Cutting & Co. of San Francisco; notes to be dated the 27th, 1872, (May twenty-seventh, 1872,) provided the settlement is made and notes delivered on or before June 5th, 1872. Otherwise, this assignment to be null and void, notwithstanding on said Cutting, unless signed by all the creditors."

On the 5th of June, the day fixed in the agreement, the complainant delivered notes to the creditors who had signed the agreement, according to the stipulation therein contained, and at the same time presented to them, to be executed, an assignment of their claims to him. The defendant, two days afterwards, returned to U. H. Dudley & Co., the notes and assignment, which had been sent to him by the complainant,

Cutting v. Dana.

with the following letter, addressed to them: "At the last meeting of your creditors at the Astor House, Messrs. Cutting & Co. said, if they could not get all the creditors to sign, that they reserved the right to reject the affair. I find on inquiry, that quite a number have refused to sign off, therefore I return your papers." The complainant, on the same day, returned the notes and assignment to the defendant, with the following letter:

NEW YORK, June 7th, 1872.

MR. W. F. DANA. *Dear Sir:*

Yours of, to U. H. D. & Co., 7th, rec'd. The understanding was distinctly had that it was optional only with me, whether I made the settlement or not, that if I had the notes ready the agreement was binding on one creditor to assign his claim. Not a single creditor has been paid more than twenty-five cents, though it was mentioned at the meeting and understood that I was to do the best I could, but make the settlement if possible. I do not intend to pay one cent over that to any one, preferring to let the matter go into bankruptcy, holding such claims as have been assigned to me, and so paying any who stand out just what the law allows, and as \$110,000 to \$115,000 extra claims would be proved in bankruptcy, the chance of any who stand out getting more than twenty cents legally, or even that, would be very small.

I think, with this explanation, you will be perfectly satisfied, and send me the assignment as enclosed.

Yours very truly,

FRANCIS CUTTING,
153 Chambers Street—

The defendant, on the same day, returned the notes and assignment to the complainant, with the following letter:

"Yours of this date, to hand. In reply, would say that I talked with the chairman of the meeting at the time, and understood from him the same thing that I wrote Messrs. D. & Co., this A. M."

Cutting v. Dana.

the 13th of November, 1872, the defendant commenced suit above mentioned, against the Dudleys, on the note 2959.12, in the Supreme Court of this state. On the 10th of the bill an injunction was issued, restraining the defendant from prosecuting that action. The defendant has answered. Replication was filed and testimony on both sides taken, and the cause is now before me on final hearing.

In his answer, the defendant alleges that the proposition made at the meeting of the 24th of May, was the same in substance as that discussed at the former meeting; that nothing was said concerning a sale by the creditors of their respective claims to the complainant, to the defendant's recollection and belief; that the understanding which he had of the agreement was, that it was mutual in its obligation and intention, and not binding on either party, unless signed by all the creditors of U. H. Dudley & Co.; that the construction put upon the written agreement in the bill of complaint was the construction which was put on it at the meeting; that before he signed the agreement, the defendant asked the chairman of the meeting the following question: "Suppose the creditors do not sign the paper?" and that the chairman replied: "Then it is not binding." The answer further alleges that the defendant is informed and believes that the agreement was not signed by all the creditors of U. H. Dudley & Co., and that so far from the complainant, or his firm, entering "to arrange a settlement for the best interests of all concerned," as represented in the complainant's letter of the 24th of May, (the circular above referred to,) the defendant is informed and believes that U. H. Dudley & Co., paid in full to certain of their creditors, more than twenty-five cents on the dollar of their claims, and particularly to Richard Oliva, at the time of such payment, had not signed the agreement, nor assigned his claim to the complainant. The answer further alleges that the agreement was made without consideration, and is not sealed with the seal of the defendant, nor of any other creditors; that by reason of its intended operation it is inequitable and unjust, and that, as it is understood

Cutting v. Dana.

by the complainant, and construed in the bill of complaint it is not the agreement of the defendant, but a trick and fraud upon him, whereby the complainant, to the defendant's surprise and injury, seeks to compel the defendant to do an act differently from what he, in good faith, intended.

The defendant's counsel insists that this suit cannot be maintained, because it is an action for the specific performance of an agreement for the sale of chattels—a contract for the sale of a debt. This objection is based on the proposition that a court of equity will not decree a specific performance of contracts, except for the purchase of lands or things that relate to the realty and are of a permanent nature; and that, where the contract is for chattels, and compensation can be made in damages, the complainant will be left to his remedy at law. The rule on the subject, which may be extracted from Lord Hardwicke's decision in *Buxton v. Lister & Cooper*, 3 Atk. 383, is, that, though in general the Court of Chancery will not entertain a bill for specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law, yet, notwithstanding this general distinction between personal contracts for goods and contracts for lands, in some cases contracts for personal property are enforceable in equity, but the court will weigh such cases with greater nicety than those which relate to real property. This court, in *Furman v. Clark*, 3 Stockt. 306, entertained a suit for specific performance of a contract for sale of chattels—clay to be delivered on board the complainant's boats at Amboy. *Sterens v. Wilson*, 3 C. E. Green 447, was a suit in which the complainant filed his bill to compel the defendant to deliver to him certain shares of the stock of a plank road and ferry company, purchased by the defendant with money furnished by the complainant, on an agreement that the defendant would transfer the same to the complainant on request. There was a trust in that case, however. In *Wright v. Bell*, 5 Price Exch. 325, and in *Adderley v. Dixon*, 1 Sim. & Stu. 608, a suit for specific performance of a contract to purchase a debt, was maintained. In *Doloret v. Rothschild*, 1 S. & S.

Cutting v. Dana.

was held that an action for specific performance of a contract for the purchase of government stock would lie. *See* *Wright v. Albrecht*, 12 Sim. 162, and *Todd v. Taft*, 7 Allen 101. In the cases in which suit was maintained for specific performance of contracts for the sale of railway stock ; and in *Wright v. Flint*, 22 Pick. 231, a bill for specific performance of a contract for the sale of the half of a brig was sustained. In *Derley v. Dixon*, the court, (Sir John Leach, V. C.,) said: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees specific performance of a contract for land, not because of the nature of the land, but because damages at law, which are calculated upon the general money value of the land, do not constitute a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quality of the like stock or goods." In that case the bill being for the performance of a contract to buy a share from the estate of two bankrupts, and so, being an action for the sale of the uncertain dividends which were to become payable from those estates, the court, upon the principle established by the cases of *Ball v. Coggs*, 1 Bro. P. C. 101, and *Taylor v. Neville* cited in *Burton v. Lister*, 3 B. & C. 33, decreed specific performance, because damages at law would not accurately represent the value of the future dividends, and to compel the purchaser to take such damages would be to compel him to sell those dividends at a conjectured price. Where the complainant has not a clear, complete and adequate remedy at law, or where some other ingredient of equity jurisdiction is mixed up with the transaction,

Cutting v. Dana.

equity will interfere to decree a specific delivery of chattels. *Story's Eq. Jur.*, § 710.

In the present case, the complainant purchased of the defendant a debt due the latter from their common debtor, who had become insolvent. The evidence shows that the estate has proved insufficient to pay even twenty-five cents on a dollar, the price which the complainant agreed to pay for the debt in question. In a suit at law by complainant against the defendant, on this contract, the damages must be uncertain; they would depend on the present and prospective future ability of the debtors, into which many uncertain elements must, of necessity, enter. What the present pecuniary responsibility of the debtors is, does not appear. The suit at law was commenced within a very few months after their failure. If their responsibility is such that this debt could be recovered from them in full, it is easy to determine the amount of damages. It would be, in that case, a mere matter of arithmetical calculation. If, on the other hand, their responsibility is not such as that the whole amount of the note and interest could now probably be collected, then it would be impossible to estimate the damages. There is also another consideration. The complainant swears that it was his understanding with the creditors that he was to go into business with U. H. Dudley, when Dudley should have made a settlement, or when one should have been made, and that he had such an understanding with Dudley. It appears that he has since then entered into business with Dudley, becoming a special partner, and as such has contributed \$60,000 to the capital, \$20,000 of which were in the assets of the firm of U. H. Dudley & Co. He would be prejudiced in the business and his interest therein, if an execution against Uriah H. Dudley should be levied on the interest of the latter therein, and perhaps might himself be compelled to pay the execution to prevent disturbance or stoppage of the business. But however that may be, and as before stated there is no evidence before me as to the pecuniary responsibility of the Dudleys, if the contract is a valid one, one which can be enforced, the complainant is entitled to the

Cutting v. Dana.

claim and the advantages to be derived from it. Again, the objection made by the defendant's counsel in this connection, that the complainant has a complete and adequate remedy at law in the premises, comes too late. As before remarked, the defendant has answered. In his answer he makes no objection on this ground. The complainant has replied to the answer, and testimony has been taken on both sides. It is too late for the defendant to make this objection. *Attorney General v. Purmort*, 5 *Paige* 620, 626; *Underhill v. Van Cortlandt*, 2 *Johns. Ch.* 339, 369; *Flint v. Clark*, *supra*; *Story's Eq. Pl.*, § 488; 1 *Daniell's Ch. Pr.* (4th ed.) 550, note 3.

Although the court may, of its own accord, dismiss the bill, where it appears on the hearing that the complainant has a complete and adequate remedy at law, notwithstanding the objection was not taken in the pleadings of the defendant, nor noticed in the argument, yet, under such circumstances, for very obvious reasons, it is the duty of the court to retain the cause, provided it be competent to grant relief and have jurisdiction of the subject matter. *Flint v. Clark*, *supra*. This court has jurisdiction in the case, and is quite competent to grant relief. But it is further objected by the defendant's counsel, that the contract in this case is unilateral, and it is insisted that therefore this court will not enforce it, because of the want of mutuality. It will be observed that the agreement is upon the expressed consideration of one dollar, and that by it the creditors who signed it, bound themselves to assign and transfer to the complainant their several claims against U. H. Dudley & Co., on the settlement therefor by the complainant, at the rate of twenty-five cents on the dollar, to be settled by notes of U. H. Dudley & Co., endorsed by Cutting & Co., to be dated May 27th, 1872, provided the settlements were made and the notes delivered on or before June 5th, 1872; otherwise the assignment was to be null and void. It is admitted that the complainant is in no default or breach, and that the notes were tendered to the defendant according to the agreement, and at the time stipulated. The

Cutting v. Dana.

defendant did not withdraw from the contract until after the tender. By the tender, the complainant accepted the offer to assign the claim. That offer was, until that time, a continuing one. On its acceptance by the complainant, the contract was complete, and that acceptance was of itself, a sufficient legal consideration for the engagement on the part of the defendant. 1 *Parsons on Contracts* 406; *Boston and Maine R. R. Co. v. Bartlett*, 5 *Cush.* 224; *Potts v. Whitehead*, 5 *C. E. Green* 55; *Williams v. Williams*, 17 *Beav.* 213; *Dowell v. Dew*, 1 *Y. & C. C. R.* 345; *Thornbury v. Bevil*, *Id.* 554; *Eliason v. Henshaw*, 4 *Wheat.* 225; *Brisban v. Boyd*, 4 *Paige* 17; *Laning v. Cole*, 3 *Green's Ch. R.* 229; *Houghwout v. Boisaubin*, 3 *C. E. Green* 315; *Pinner v. Sharp*, 8 *C. E. Green* 274. On the acceptance by the complainant, he became in equity the owner of the claim, and was entitled to an assignment of the note, which was the evidence of it.

It remains to consider the defence of mistake set up in the answer. The defendant alleges that he not only understood that the arrangement was not to be binding on him unless all the creditors entered into it, but that he inquired of the chairman of the meeting on the subject, and received an answer from him to that effect. The evidence shows, conclusively, that such was not the understanding; that the reason why the former arrangement had fallen through was, that it was on that condition; that the new arrangement was distinctly expressed and understood to be free from that feature; that the complainant was to purchase the claims of such of the creditors as were or should be disposed to sell to him on the terms specified in the written agreement, without regard to the claims of the other creditors, with whom he was to make such arrangement as he might be able. In the next place, the written agreement contains no provision that it was not to be binding on those who signed it unless it was signed by all the creditors. The chairman of the meeting swears positively, that he made no statement to the defendant such as the defendant testifies to on this score. That the defendant understood the agreement according to its terms, appears also

Cutting v. Dana.

from his letter to Messrs. U. H. Dudley & Co. returning the notes. His language there is : " At the last meeting of your creditors, at the Astor House, Messrs. Cutting & Co. said, if they could not get all the creditors to sign, that they reserved the right to reject the affair. I find, on inquiry, that quite a number have refused to sign off, therefore I return your papers." He does not, in that letter, state that the understanding was that the agreement was not to be binding on the signers unless all the creditors should sign it, but that Cutting & Co. reserved the right to refuse to carry out the agreement unless all the creditors should sign it. In his letter of June .7th, 1872, to the complainant, in answer to the complainant's letter to him of that date, he refers to the statement contained in the last mentioned letter as being what he understood from the chairman of the meeting. The agreement is explicit in its terms. It is an agreement by the creditors who signed it, to sell their claims to the complainant on the terms there specified, to be strictly performed ; time being of the essence of the contract ; and with the proviso that no obligation should arise from the agreement, as far as the complainant was concerned, unless all the creditors should sign. Now, is it probable that the defendant was mistaken as to the terms of the agreement ? The proceedings of the meeting of creditors were open to all who were present. There appears to have been no concealment, or attempt at concealment. The reason of the failure of the former effort was known to all through the circular, and besides, it was stated at the meeting, by the complainant. It was because of the refusal of some of the creditors to accept the terms of the arrangement, which required the concurrence of all the creditors to render it effectual. The creditors present, called on the complainant for a proposition, and he made one, the basis of which, was entire freedom on his part and obligation on the part of the creditors who should sign to sell their claims to him, notwithstanding the refusal of any or all others. The chairman, whose firm was a creditor to the amount of \$28,000, in his testimony says : " I did not say to any one at that

Cutting v. Dana.

meeting, that the creditors who signed the paper, were not bound, unless all signed it; the very object of the meeting was to avoid that." In his cross-examination he says: "It was proposed and passed by resolution, that Mr. Cutting should take assignments of the claims of the creditors who were there, at twenty-five cents on the dollar, and take the assets of Dudley & Co. The agreement was, that those who signed the paper, were bound to take twenty-five cents on the dollar and assign their claims, while it was left optional with Mr. Cutting to be bound by it or not. I think the agreement said that Mr. Cutting was not bound, unless he obtained the signatures of all the creditors." Mr. Dempster, a creditor to the amount of about \$15,000, testifies that Mr. Cutting rose and stated to the meeting that, owing to the unwillingness of a number of creditors to accept the terms proposed at the former meeting, the arrangement had fallen through and that he withdrew from it, and the creditors, after considerable talk and discussion of the subject, urged him to make another effort, and he proposed to the meeting that he would buy their claims at twenty-five per cent., changing the time from four, eight and twelve months, to six and twelve months, and changing the dates of the notes from February to May, as he thinks, the date of the meeting; that there was considerable discussion over it, and considerable efforts made to induce some who were there to agree to it; that these efforts were made by different gentlemen, creditors; that the majority of the creditors were very anxious that the matter should be carried out, for fear that otherwise they would get nothing; that his impression is, that finally every body in the room agreed, but one; that the majority were quite anxious that the few who had held out should come in; that all the creditors were not present, but all who were, he thinks, agreed to it but one, and he was a foreigner by his accent; he seemed to think the other creditors should make him whole; that the agreement was read before it was signed; that the witness objected to the wording of the agreement, saying to the meeting, that those of them who sold their

Cutting v. Dana.

ms to Mr. Cutting, were bound, while those who did not or were not present, might not be bound, and he proposed an amendment to the agreement, stipulating that the assents should be given on the 5th of June; that the amendment was incorporated into the agreement; that some one asked Mr. Cutting to give the names of those who were willing to sign, and the witness volunteered to go and see some of them as he thought he could influence, because he felt that if they did not get more to sign than had expressed their willingness to sign, Mr. Cutting would not carry it out; that in going over the names of those who had refused to sign, Mr. Cutting named two or three who, he said, would not sign, and said it was of no use to go and see them, and said their amounts were not large, and if the witness could help him in getting the signature of Knauth, Knachod and Kane, and the officer of some bank, whose name the witness cannot recall, and some other firm, he thinks in Exchange Place, that although the others did not sign, he would carry it out; that this conversation was public in the audience of the meeting; that the understanding was, and the understanding of the meeting was, that those who signed, were bound, while it was left optional with Mr. Cutting to be bound by the agreement or not; and the witness wanted to give that option to the 5th of June; that neither the president, nor any one else, announced at that meeting, that the parties signing were not bound, unless all signed, but on the contrary, at the preceding meeting, the consent of all was necessary, as had been reported to him by his partner, (the witness was not present at the former meeting, but his firm was represented there by his partner,) and this was a substituted arrangement. On cross-examination he says, that the understanding at the second meeting was, that those of the creditors who signed, should give Mr. Cutting until the 5th of June to decide whether he would buy their claims at ninety-five cents on the dollar or not, with the change in the law mentioned; that they were bound to sell, but he was bound to buy, and that they could not take any legal pro-

Cutting v. Dana.

ceedings until after the 5th of June, to secure themselves in any other way. He further says, that the agreement was read, but by whom he cannot say, but thinks by Mr. Chapman, (the chairman;) that objection was made to the agreement that it left it optional for an indefinite period with Mr. Cutting to carry out the bargain or not; that he made the objection himself, because he thought the time ought to be limited when that option should expire. Mr. Day, also a creditor, swears that he was present at the meeting, and that it was perfectly understood there that all the creditors would not sign, and that the only creditor at the meeting who did not sign was Mr. Oliva, who said he would not sign it unless he got one hundred cents on the dollar. He says, that at the first meeting, it was talked over generally whether the agreement then made, was binding unless all signed, and it was the distinct understanding that it was not; that the matter was discussed at the second meeting; that parties signing were bound to sell their claims to Mr. Cutting, whether others did or not; that Mr. Chapman read the agreement and a great many wanted to know what was the effect of the agreement if they signed it, whether they were holden and Mr. Cutting not, and Mr. Chapman said, in his opinion, they were holden; and he adds, "we signed with that understanding; I did, I know, and it was fully explained and discussed." He says, the matter was freely discussed, and Mr. Oliva would not accept it and left the room; that the expression of the meeting was most emphatic that any man signing the agreement was holden, irrespective of other creditors signing it; that the expression was ascertained by discussion; that there was no vote taken on it; that there were different views on the subject, and that it was known that there were several who would not come into the arrangement. He says, he thinks some of the parties had counsel present; that he thinks Mr. Oliva and others had their counsel there. The mistake which the defendant sets up in his answer is not proved.

There will be a decree for the complainant.

Bullock's Executors v. Woodward.

BULLOCK'S EXECUTORS vs. WOODWARD and others.

Application to set aside a sheriff's sale on the ground of unfairness, and from an alleged misunderstanding as to the manner of sale and amount and apportionment of encumbrances, refused.

—
A petition to set aside sheriff's sale.

By *William H. Vredenburg*, for the petitioner.

By *G. S. Cannon*, for the purchaser.

THE CHANCELLOR.

Application is made by Robert Woodward, who was the holder of the equity of redemption of the mortgaged premises ordered to be sold in this cause, to set aside a sale made by the sheriff of Monmouth under the execution. The ground of the application is the alleged unfairness of the sale arising from a misunderstanding said to have existed on the part of persons present, who intended to bid in the property as to the manner of sale and the encumbrances to which the premises would be subject in the hands of the purchaser. The unfairness alleged is claimed to have arisen from the statement made by the deputy sheriff by whom the property was put up for sale and cried off, that the premises were sold subject to all prior encumbrances. The property in question was the second tract mentioned in the execution.

It is known as the homestead. The first tract, which was sold off just before the second was put up, was sold subject to the encumbrance of a mortgage called the Cox mortgage, upon it, the holder of that encumbrance not having been a party to the suit. The execution commanded the sale of the two tracts, separately, and that out of the proceeds of the sale of the first, the complainant should, in the

Bullock's Executors v. Woodward.

first place, be paid \$5900.96, with interest and costs, and that out of the proceeds of the sale of the homestead, the sheriff should first pay to Edward Black, executor of Job Black, deceased, \$4825.50, with interest and costs, and then to the complainants any balance of the debt, interest, and costs remaining unpaid. There appears to have been no misunderstanding as to the sale of the first tract; but it is alleged that, that tract having been sold subject to the Cox mortgage, the announcement made by the deputy sheriff, that the sale of the homestead was to be made subject to all prior encumbrances, induced some of those present at the sale to conclude that that property was to be sold subject to the Black mortgage. The first mortgage was struck off to Anthony Bullock, one of the complainants, at \$1700, and the homestead was struck off to him at \$5100. By the will of Robert Woodward, Sen., legacies to the amount of \$14,000 were charged on a farm called the Lippincott Place and the homestead. It was estimated that the homestead ought to pay one-half of the legacies, and on that half interest was in arrear, so that the encumbrance of the legacies on the homestead property amounted to about \$7450. The price paid by Mr. Bullock for that property, therefore, was about \$12,550, equal to about \$70 an acre, for there are one hundred and sixty acres of it. Soon after the sale Mr. Bullock, the purchaser, sold the homestead and made a contract to convey it accordingly, to Dr. James M. Bean, one of the bidders thereon, at the price of \$14,550. Much testimony has been taken by the parties, which I have very carefully examined and considered. It appears very clearly from the evidence, that the deputy sheriff set up the property for sale, subject to all prior encumbrances, and that he made no announcement or statement whatever to the effect that the property was to be sold subject to the Black mortgage. Dr. George Goodell, one of the petitioner's witnesses, testifies that the deputy sheriff was asked "what the encumbrances were in the will?" and he said he did not know; and the witness says that his impression is, that the deputy sheriff, or

Bullock's Executors v. Woodward.

the sheriff, in answer to some one's question, stated that he was "selling the petitioner's interest, subject to the will." All present understood that the homestead was sold subject to its proportion of the legacies. It is claimed by the petitioner that the first tract having been sold subject to the Cox mortgage, the conclusion was very naturally drawn by the bidders present, or some of them at least, that the homestead was sold in like manner, subject to the Black mortgage, that being an encumbrance prior to the complainants' mortgage. It is alleged that Mr. Bullock, the purchaser, was himself under this erroneous impression during the bidding, up to the time when the property was standing at a bid, (which was Dr. Bean's,) of \$1400, and that then the sheriff, who was present, told him that that money would go to the Black mortgage, whereupon Mr. Bullock made a bid of \$4000. But Mr. Bullock testifies that he fully understood the matter before the sheriff spoke to him on the subject, and it appears that he had taken pains to inform himself before the sale, as to how, and subject to what encumbrances, the property would be sold; and not only so, but he had given the benefit of his information on the subject to Dr. Bean, the evening before the day of the sheriff's sale, and also at the opening of the sale. Of the persons who have been produced as witnesses on behalf of the petitioner, Dr. Bean is the only one who appears to have been a bidder at the sale, and he admits that he knew that the property was not sold subject to the Black mortgage, but says that, in his excitement arising from the contest in bidding on the first tract, he became confused, and forgot it. His bidding on the homestead was done through Samuel Conover. The latter, however, is not produced as a witness. The other witnesses of the petitioner who testify on the subject are, Oliver H. P. Emley, George Goodell, John G. Meirs, Gilbert S. Lawrie, and Edward B. Woodward, a brother of the petitioner. Mr. Emley testifies that he did not attend the sale as a purchaser, and did not want to buy; that he took no interest in it, and was not there when the execution and con-

Bullock's Executors v. Woodward.

ditions of sale were read. Dr. Goodell was the holder of an encumbrance of about \$2000, subsequent to the complainants' mortgage. He says he came to look after his debt, and that he knew what the encumbrances against the property were, from a statement which he had obtained from his counsel. He gives as his reason for not making further inquiries, that he was satisfied that the property would not bring enough to pay his claim, and he says he will not say he would have given the amount of the encumbrances for the property. He does not appear to have made a bid upon it. Mr. Meirs attended the sale, intending, he says, to buy the property, if it did not bring more than \$90 an acre. He, however, made no bid upon it, and admits that he gave to Mr. Bullock as a reason (he says he gave it as one reason) for not bidding, that he did not know what amount of interest was due on the legacies. Mr. Lawrie attended the sale, he says, to bid on the property, to prevent it from being sacrificed; but he did not bid on it. He seems to have taken no steps to inform himself as to the encumbrances. He says he heard the execution read. Edward B. Woodward did not bid, and does not appear to have been present with an intention to bid. On the other hand, the person, Mr. William W. Conover, who bid against Mr. Bullock from the bid of \$4000, testifies that he heard all the conditions of the sale read; that he understood from the sheriff that the one hundred and sixty acres were sold subject to a legacy of about \$7000; that he bid for the property with that understanding, and declined advancing his bid beyond \$5050; that the sheriff, at the sale, in reply to a statement by some one that the premises were sold subject to the Black mortgage, said openly, that they were not sold subject to that mortgage. This witness testifies that he has attended sheriff's sales frequently in Monmouth county, and never saw a fairer sale conducted than that was. The price at which the property was struck off to Mr. Bullock, affords no reason for setting aside the sale. Five witnesses are produced by him, from whose testimony it appears that the price was all that the property could be reasonably expected to bring at a forced

Bullock's Executors v. Woodward.

sale. It is proved that Dr. Bean regarded the price which he agreed to pay Mr. Bullock for the property as a high one, and one which he would not have been willing to give for it, but for the fact that he desired to own it because it reminded him, in its hilliness, of his old home in New Hampshire. The sale was fairly conducted. There was a large number of persons present, from seventy-five to one hundred. No improper or unfair conduct is imputed to the sheriff, or his deputy. From twenty minutes to half an hour was occupied in selling the property, including an intermission of five minutes. The deputy sheriff had the execution there, and read it in the hearing of the persons present at the sale. The purchaser appears to have taken pains to induce others to buy. He testifies that, while the property was being sold, he stepped back into the crowd and told them, the bid being then \$4600, that the property was being cried at \$12,100, including its share of the legacies, and that he thought it was worth a little more. But it is urged that the property was sold at a disadvantage, because there had never been any apportionment of the legacies. But the petitioner's witness, Gilbert S. Lawrie, testifies that he had heard about the encumbrance of the legacies from a dozen sources; that the petitioner, among others, told him about it, and that it was the general talk of the neighborhood; that they said it was \$14,000 on all the property, supposed to be \$7000 on the petitioner's property, with two years' interest on \$5000 of it, and that the petitioner told him that that was the amount of the encumbrances under the will, and the witness adds, that before the sale he had written it down. The deputy sheriff testifies that he heard the petitioner and his brother Edward stating something about the legacies before the sale began. It appears, also, that by agreement between the owners of the property charged with the legacies, the petitioner was to pay in respect of his ownership of the homestead, the interest of one-half of the legacy of \$14,000.

I see no reason for setting aside the sale. The petition will be dismissed, with costs.

Tompkins v. Horton.

TOMPKINS vs. HORTON and others.

1. The title of a purchaser at a sheriff's sale under an execution, issued upon a judgment recovered under a mechanics' lien, general as against the owner and special as against the lands, is paramount to all encumbrances put upon the property after the commencement of the building.

2. A mortgagee is not an "owner" within the meaning of the mechanics' lien law, and is not entitled to notice of a suit upon a lien claim. The owner of the legal estate is alone to be made a party.

On final hearing.

Mr. John Linn, for complainant.

Mr. J. Dixon, for defendant, Gordon Farmer.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage for \$22,300 and interest, given by "The Building and Improvement Association of Hudson County," to the complainant, dated June 1st, 1870, and recorded on the 9th of that month, on premises known as the Magnolia Hotel property at Toms' river, in Ocean county. On the 20th of July, 1870, the Association gave to John G. Trusdell and Morris K. Crane, a mortgage, now owned by the former, for \$13,000 and interest, upon the same, with other property. This mortgage was recorded on the 20th of July, 1870. On the 1st of September, 1870, the Association conveyed the premises described in the complainant's mortgage, in fee simple, to Morris K. Crane. The deed, however, was not recorded until the 26th of October, 1870. The Association acquired the premises in fee simple, by deed from John B. Horton and wife, dated April 11th, 1870, recorded on the 6th of May, following. In 1870, the Association built a building for a hotel on the premises. It was begun before May, and finished about the following July.

Tompkins v. Horton.

lien claims were filed under the mechanics' lien law, work and materials done and furnished for this building. Of these claims were filed on the 30th of September, others on the 4th of October in that year, and others on the 28th of the last mentioned month, the 23d of November, the 7th, 23d and 24th of January, and the 22d of February and the 8th of June, 1871. Those filed on the 30th of September and 4th of October, 1870, were filed against the Association only, as builder and owner. The deed to Crane had not then been recorded. The others were filed against the Association as builder, and Crane as owner. General liens, general as against the Association and special as against the premises, were duly obtained on these liens, and the sheriff of Ocean county sold the premises under executions on judgments, to John B. Horton, on the 30th of August, 1871, for \$27,000. Horton, on the same day, mortgaged the premises to Gordon Farmer, trustee, to secure the payment of \$14,000, with interest.

The bill states the above mortgages and judgments, and judgments. It does not refer to the character of the liens upon the lien claims, nor to the alleged effect of the lien law, of the sale under the writs of *fiery facias* thereon, but after stating that the property was sold by the sheriff of Ocean to Horton, under those writs, it alleges that the estate of Morris K. Crane in the land, was thereby extinguished, and charges that the conveyance by the sheriff, and by virtue of that sale, was made subsequent to and without notice of the complainant's mortgage. It makes a large in reference to the mortgage to Farmer. The bill asks for relief in the usual way, foreclosure and sale, but for no other relief.

Gordon Farmer, in his answer, insists that the deed to him passed a title in fee simple, free from the encumbrances of the complainant's mortgage and that of Trusdell, and further insists, that by the mortgage given by Horton to the title of the latter as mortgagee under a mortgage given to him by the Association, on the premises described in

Tompkins v. Horton.

the complainant's mortgage, to secure the payment of \$25,000, of which \$10,000 was for purchase money of the land, and \$15,000 for money advanced for erecting the building, passed to Farmer. This mortgage is dated April 11th, 1870, and was recorded on the 13th of the same month. Trusdell, by his answer, alleges that before the conveyance to Crane, the latter assigned to him, verbally, his interest in the mortgage from the Association to them, and he claims that, therefore, the merger set up in the bill, of Crane's title to the mortgage by reason of the conveyance to him, did not take place.

The questions presented on the argument of this cause are, whether the sale to John B. Horton, under the lien claims, passed the title to the land free of the encumbrance of the mortgages which were executed and recorded after the commencement of the building; whether the interest of John B. Horton, under the mortgage given to him by the Building and Improvement Association of Hudson county, passed by his mortgage to Gordon Farmer, and whether the interest of Morris K. Crane in the mortgage given to John G. Trusdell and him merged, on the conveyance of the premises by the Association to him.

The evidence shows, and it was assumed and admitted on the hearing, that the building was commenced prior to May, 1870. It is admitted that notice was given to the Association and Crane, as land owners, according to law, and no question is raised as to the regularity of the lien proceedings, or the judgments or sales thereunder. It appears, indeed, that as to some of the demands, the lien claims were filed against the Association as owner, after the sale to Crane, and it also appears that at that time, the deed from the Association to Crane was not recorded. But all the other claims were filed against the Association as builder, and Crane as owner. The sale by the sheriff, was under the executions issued on all these judgments. The principal question to be decided is, whether the title thus conveyed is good against the mortgage of the complainant and that of Trusdell. The eleventh section of the original act of the mechanics' lien law,

Tompkins v. Horton.

(*Nix. Dig.* 574,) declares that the deed shall convey to the purchaser the building free from any former encumbrance on the lands, and shall convey the estate in the lands which the owner had at or at any time after the commencement of the building, within one year before the filing of the claim, subject to all prior encumbrances, and free from all encumbrances or estates created by or obtained against such owner afterwards, and from all estates and encumbrances created by deed or mortgage made by such owner or any claiming under him, and not recorded or registered in the office of the clerk of the county, at the commencement of the building. The first section of the supplement of March 14th, 1863, provides that the sale shall convey the estate of the owner in the lands and in the buildings, subject to all mortgages and other encumbrances created and recorded prior to the commencement of the building. The mortgage of the complainant and that of Trusdell, were both taken after the building was commenced. If the statutory directions as to parties to the lien claim have been observed, the result necessarily follows, that the title acquired by Horton under the lien claims, is superior to all the encumbrances which were put upon the property by the Association after the commencement of the building.

But, it is urged by the counsel of the complainant and Trusdell, that those mortgagees have had no notice of the suits upon the lien claims under which the property was sold, and by virtue of which these encumbrances are, it is claimed, wholly cut off, and they insist that those mortgagees were entitled to such notice, and could not be deprived of their liens without it. Unless they were owners within the meaning of the act, they were not entitled to notice, and their encumbrances are cut off by the sale.

The act declares who shall be parties to the suit for enforcement of the lien, and what proceedings shall be taken, and in what tribunal they shall be instituted. It is not in this court, but in a court of law—in the Circuit Court of the county; not by bill in equity, nor by action in which all parties interested in the land shall be notified, but by sum-

Tompkins v. Horton.

mons, to be directed to and served on the builder and owner of the land. Though the Supreme Court has passed upon the question as to who, as between the owner at the time of the commencement of the building, and the owner at the time of filing the lien, is to be regarded as the "owner" within the meaning of the law, (*Edwards v. Derrickson*, 4 *Dutcher* 39; *Robins v. Bunn*, 5 *Vroom* 322,) the question now before me does not appear by any reported case to have been passed upon, either in that court or this. In the case first cited, the late Justice Vredenburg, in the opinion delivered by him, held, that so far as it relates to the enforcement of the lien, the proceeding under the statute is a chancery proceeding, and that, therefore, all encumbrancers whose interests are to be affected, should be made parties, and that no encumbrancer can be deprived of his interest in the land sold by virtue of the lien, unless he shall have been made a party to the suit, and duly notified, accordingly. He held that the word "owner" in the act, includes all encumbrancers, all who are interested in the property, to sell which the proceedings are taken. That the act will not bear this construction, appears to me to be clear from its language. It will appear from an examination of the act that the legislature, by the term "owner," intended to designate the person for whom, as owner of the land, the building is erected. The act provides, by its third section, for the retention by the owner or owners of any building, of the amount due and unpaid, after demand, to any journeyman or laborer who shall have done work on the building, or materialman who shall have furnished materials therefor, out of the amount owing by such owner or owners to the master workman or contractor. It is evident that by the word "owner," in this section, is meant the person for whom, as the owner of the land, the building is constructed.

By the fourth section it is enacted, that if any building be erected by a tenant, or other person than the owner of the land, then, only the building and the estate of such tenant or other person shall be subject to the lien, unless the building

Tompkins v. Horton.

be erected by the consent of the owner of the lands, in writing, to be acknowledged and recorded. It is clear that the term "owner" here, is applied to the person owning the land, as distinguished from a tenant or from a person who may be a mere possessor.

The sixth section provides that the lien claim shall contain the name of the owner or owners of the land, or of the estate therein, on which the lien is claimed, and by the seventh section it is provided that the county clerk in entering the lien, shall enter first the name of the owner of the building and land upon which the same is claimed.

The eighth provides that suit shall be commenced by summons against the "builder and owner." The ninth provides for the proceedings in the suit, and prescribes a special plea for the owner.

By the eleventh, it is enacted that under the special *fiери facias*, to be issued according to the tenth section, the sheriff or other officer shall advertise and sell and convey the building and lot in the same manner as directed by law in case of lands levied on for debt, and that the deed given by the sheriff or officer shall convey to the purchaser the building, free from any former encumbrance on the land, and shall convey the estate in the lands which the owner had at or at any time after the commencement of the building, within one year before the filing of the claim in the clerk's office, subject to all prior encumbrances, and free from all encumbrances or estates created by or obtained against such owner afterwards, and from all estates and encumbrances created by deed or mortgage made by such owner or any claiming under him, and not recorded or registered in the office of the county clerk at the commencement of the building.

The twelfth section limits the time within which the claim is to be filed and enforced, and provides for an extension of the time by a written agreement to that end, signed by the claimant and the land owner. It also provides that suit shall be brought by the claimant in thirty days, on his re-

Tompkins v. Horton.

ceiving written notice from the owner of the land or buildings, requiring him so to commence his action.

By the fourteenth section all lien claims for erecting the same building are made concurrent liens on the building and land, and are to be paid pro rata out of the proceeds of sale. It provides that the Circuit Court shall have full power to adopt such rules of practice and pleading and to make all such orders as are necessary and proper to carry into effect the objects of the act, and to secure a proper disposition of the proceeds of the sale among all persons entitled thereto by *the provisions of the act*.

The fifteenth section provides that the land owner desiring to contest the claim and free his house and land from it, may pay the amount claimed to the county clerk.

The supplement of March 9th, 1855, extends the lien to mills and manufactories and the lots whereon the same are situated, for all debts contracted by the owner or owners, or by any person with the consent of such owner or owners, in writing, for repairs of fixed machinery, gearing or other fixtures for manufacturing purposes.

By the supplement of March 16th, 1859, a lien is given, under like provisions, for repairs to all buildings; the lien, however, in such case, is not to be valid against a bona fide purchaser or mortgagee, before it is filed in the county clerk's office.

By the supplement of April 6th, 1866, it is enacted that the lien given by the original act or any of its supplements, shall and may be claimed, filed, and enforced by suit against "the builder or builders, their executors or administrators, and against the owner or owners of the building and the lot of land and curtilage, their executors or administrators."

That the act contemplates that no notice shall be given to any person, except the contractor and the land owner, as contradistinguished from an encumbrancer, seems to me to be obvious. Nowhere does it provide for notice to any encumbrancer. It not only does not recognize the right of a mortgagee or judgment creditor to be made a party to the

Tompkins v. Horton.

proceedings, but it expressly saves (§§ 11 and 66,) the rights of all encumbrancers, whose liens are prior to the commencement of the building, and in equally express terms, (§ 11,) cuts off those of all subsequent encumbrancers. There appears to have been no oversight, but direct legislation on the subject of the encumbrances. The "owner" is to be notified, and the premises are to be sold "free from all encumbrances or estates created by or obtained against the owner after the commencement of the building, and from all estates created by deed or mortgage made by such owner or any claiming under him, and not recorded or registered in the clerk's office." It seems to me clear that the legislature did not intend that encumbrancers should be notified. The person to be notified is the "owner," by or against whom encumbrances are created.

The reason why the act contains no provision for notice to encumbrancers is, probably, that it was not intended that the proceeding to enforce a lien should be a proceeding in equity, but an easy and expeditious method at law. The mechanic or materialman was not to be embarrassed by subsequent encumbrances, and as to prior ones recorded, his lien was to be subject to them. The theory of the legislature was, that a subsequent encumbrancer is a privy in estate with the owner, and besides the building is to him, notice of the possible encumbrance of the lien. He takes his encumbrance, subject to the provision of the statute in favor of the mechanic and materialman, to whom a lien paramount to his, is given by law. As was said by Chief Justice Shaw in *Howard v. Robinson*, 5 *Cush.* 119, 124, a case involving the question now under consideration: "If it is said that the mortgagee may be injured for want of notice, the answer is, that such notice has been given as the law requires and as the law assumes to be sufficient for practical purposes. Such subsequent mortgagee takes his title with constructive notice of the prior title by a mechanic's lien; that lien is of a very limited duration, and he must take notice and watch the proceedings at his peril." After referring to the fact that the statute provides

Tompkins v. Horton.

for a public notice to all persons of the sale, he says : " Practically, it is scarcely credible that such a judicial proceeding can be commenced and go to its final determination in a decree for sale, without its being known to a subsequent mortgagee, ordinarily careful of his rights." The remarks of the court in *State of Iowa v. Eads*, 15 Iowa 114, are apposite also. There the subsequent mortgagee tendered to the purchaser at the lien sale, the amount of the debt, interests and costs, which were not accepted. The plaintiff on this tender, claimed the right in equity to redeem, because the state, then a mortgagee, was not made a party to the proceedings to enforce the mechanic's lien. " This assumption proceeds upon the ground that the rules and principles applicable and peculiar to the foreclosure of mortgages, equally apply to proceedings for the enforcement of mechanics' liens. The analogy does not hold good. The former is a proceeding in equity, the rules of which require that as the proceeding affects the land, all who have an interest therein, and a right to redeem from the mortgage, such as junior mortgagees, although not indispensable, should be made parties thereto, if it is desired to cut off their equity of redemption, which exists not only by the long established usages and rules of equity, but because, perhaps, of their being privies in estate. On the other hand, the enforcement of a mechanic's lien is a proceeding at law, where no equity of redemption exists, and we are not aware that it has ever been held to be necessary in such a proceeding, that encumbrancers by mortgage or other liens, (except of the same kind,) should be made parties thereto, while it will be found upon examination, that it has been held just to the reverse. *Howard v. Robinson*, 5 Cush. 119; *Vito Kiti v. Dixon*, 12 Mo. 483; *Spence v. Etter*, 3 Eng. 69. A mechanic's lien, like that of an attachment, when confirmed or made effective by judgment, is binding upon the parties thereto. And the law, in order to give full effect to the principle by which the parties are held bound by it, equally concludes, by the same proceedings, all persons who are represented by the parties, and claim under them, or are

Tompkins v. Horton.

vy to them, and they are estopped from litigating that which is conclusive upon those with whom they stand thus situated." *Volenti non fit injuria*. The mortgagee whose lien is taken with notice of the liability of the land to the lien created by statute, and with notice also of the provision that in the enforcement of that lien no notice will be given to him, cannot complain of a result which he had reason to anticipate and which he is presumed to have contemplated. Every man must be presumed to know the public laws in existence, and to have contracted with reference to their provisions. I am unable to adopt the view of Mr. Justice Vredenburg, but am constrained to adopt that of Chief Justice Green, expressed in his dissenting opinion in *Edwards v. Derrickson*. He there says: "There is, in fact, no mode provided by the act by which all the parties interested can be brought before the court, as in a case in equity. The owner of the legal estate, alone to be made a party, and the only question is whether, in contemplation of the statute, it is the owner upon whose estate the lien attaches, or the owner to whom the legal title is subsequently transferred." Justice Vredenburg places his construction of the statute on the principles of constitutional law, and also, holding that those principles forbid that in such a case, a man's interest shall be affected, unless he shall have been notified of the proceeding by which it is sought to affect it.

But I see no violation of any principle of constitutional law or of natural justice, in the provision which disregards the claims of a mortgagee who is notified by statute, before he makes his mortgage, that if he shall do so, his claim will be disregarded and will be liable to be defeated by a sale under a prior encumbrance, of a peculiar and specified character, without notice to him. Our recording acts are not in violation of any constitutional principle or any principle of natural justice, although by virtue of their provisions, a lien may be defeated and an estate lost, merely by failure to give notice of them to subsequent encumbrancers or grantees ignorant of their existence. To the suggestion that the act in question operates hardly on subsequent encumbrancers in some cases,

Tompkins v. Horton.

the language of Chancellor Zabriskie in *Mechanics' Mutual Loan Association v. Albertson*, 8 C. E. Green 318, is pertinent: "This act was not intended for the protection of mortgagees or purchasers, as a part of the system of the registry law, so long part of the state policy, but in utter disregard of it, makes lands liable for debts which need not be registered for a year after contracted, without any possibility of a purchaser or mortgagee finding out with certainty, whether there are such claims. The mechanics and materialmen could not be efficiently protected without some risk to the mortgagee and the purchaser, and the legislature, when one must suffer, have chosen to protect the former at the expense of the capitalist. A wiser and more just law than the mechanics' lien law can be imagined, even if its enactment could not be procured. But it is the duty of the court to administer the law as it exists, and to construe it as its intention is shown by its provisions." This law has stood on the statute book for over twenty years, and the practice under it has generally been in accordance with the views I have expressed. In some cases cautious practitioners have, in view of the fact, that the subject has not, in this phase of it, passed under the examination of our courts, made the encumbrancers, judgment creditors and mortgagees, parties, but this has not been the general practice, for the reason that the construction put on the act by the bar, has been that the owner for whom the building was erected, alone was intended by the word "owner" in the act, and that it was necessary to notify such owner alone. As an exposition of the meaning of the act, this practice has great significance. Very many land titles rest upon such proceedings so instituted and conducted, and necessarily, therefore, depend for their protection against encumbrances created after the commencement of the building, upon the construction of the act. Although, for more than twenty years, the construction which I put upon the act has been acted upon, and as a consequence, encumbrances have been defeated, without notice to the holders of them, the question has never, as far as our books of reports show, been raised by such en-

Dusenbury v. Mayor and Council of Newark.

umbrancers, and the legislature have not seen fit to amend the law in this particular, or even to declare more explicitly their intention on the point under consideration.

The conclusion at which I have arrived in regard to the title under the lien claims, that it is paramount to all encumbrances put on the property after the commencement of the building, renders it unnecessary to consider the remaining questions.

The bill will be dismissed.

DUSENBURY and others vs. THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK.

1. When land owners stand by and permit street improvements to be made by a contractor in violation of his contract, and permit the authorities to pay for such improvements, equity will not enjoin the authorities from enforcing payment of assessments made therefor, under authority of the charter.

2. As a general rule, equity will not interfere to restrain the collection of an assessment which is illegal or void, merely because of its illegality; there must be some special circumstances attending the injury threatened to bring the case within some recognized head of equity jurisprudence; otherwise, the person aggrieved will be left to his remedy at law.

3. The objection that the party has never had an adequate remedy at law, cannot avail him in this case; the reasons considered.

On order to show cause why injunction should not be issued.

Mr. J. W. Taylor, for the complainants.

Mr. W. H. Francis, for defendants.

THE CHANCELLOR.

The complainants are owners of land on the line of Fairmount avenue, in the city of Newark, assessed under the pro-

Dusenbury v. Mayor and Council of Newark.

visions of the charter of that city, for a part of the expenses of regulating that avenue and curbing and flagging the sidewalks thereof. The work was done under an ordinance of the common council, passed in or about the month of June, 1869. The contract for it was made on or about the 17th of September, in that year. It provided that the whole work should be completed on or before the 1st of November next following. It was not finished, however, according to the statement of the bill, until late in the year 1872. The complainants allege that the work and materials were not in accordance with the stipulations of the contract in that behalf, but were of an inferior quality, and that they from time to time during the work, vainly remonstrated against the disregard of the contract. The total cost of the work was \$33,670.24, which was paid in installments by the city to the contractor in full, the last payment having been made on or about the 2d of November, 1872. The complainants allege that the assessments levied on their land were made without regard to the benefit derived from the improvement, but the whole cost of the work was assessed upon them and the other owners of land on the line of the avenue, in proportion to the number of linear feet owned by them. The bill charges fraudulent collusion between the contractor and the city authorities in the disregard of the provisions of the contract as to the work and materials, and prays that the city may be enjoined from enforcing payment of the assessments against the complainants' property, by sale of the property under the provisions of the charter, until the cost of the improvement shall have been reduced by proper deductions to correspond with the inferior quality of materials and workmanship, and until the assessments shall have been made and imposed with respect and in proportion to the ascertained benefits. On the filing of the bill, an order to show cause why an injunction should not be issued according to the prayer of the bill, was made, with an *interim* injunction. This case is similar in its facts to the cases of *Bond v. Mayor, &c., of Newark*, 4 C. E. Green 376, and *Liebstein v. Mayor, &c., of Newark*, 9 C. E.

Dusenbury v. Mayor and Council of Newark.

Green 200, and on the principle of those cases, the order to show cause must be discharged. The complainants' application to this court for relief, was not made until nearly a year and a half after the last payment was made upon the contract. For the reasons on which the decision of those causes was based, the complainants cannot successfully invoke the aid of this court in respect either to the negligence or fraud of the contractor or the city authorities in the performance of the work. The complainants, however, insist that if they are not entitled to relief on those grounds, they are entitled to it on the ground that the assessments made upon their lands have been made on a principle not only unjust, but in contravention of their constitutional rights, and which has been condemned by the Court of Errors and Appeals in its recent decision in *The State, Agents and others, pros., v. The Mayor, &c., of Newark*. But the complainants had an adequate remedy at law by *certiorari*, of which they might have availed themselves. This court, therefore, will not interfere to prevent the city from enforcing payment of the assessments. As a general rule, equity will not interfere to restrain the collection of a tax which is illegal or void, merely because of its illegality, but there must be some special circumstances attending the injury threatened, to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law. *High on Injunctions*, § 354. This rule, with its exceptions, was recognized in *Morris Canal and Banking Company v. Jersey City*, 1 *Beas.* 252, and in *Liebstein v. Mayor, &c., of Newark*. But, it is insisted that in this case, the complainants have never had an adequate remedy at law, for during the whole period within which they might have brought a *certiorari*, the decisions of the Supreme Court on the constitutional question involved in this case stood adverse to their claim, so that recourse to that tribunal would have been unavailing, whereas, by the decision in *The State, Agents and others, prosecutors, v. Mayor, &c., of Newark*, the ruling of the Supreme Court, as it stood during the period above alluded

Lewis v. City of Elizabeth.

to, was not sustained. This suggestion cannot avail the complainants, for in the first place, *non constat*, that the Supreme Court would not have granted the complainants the relief to which, according to the last mentioned case, they were entitled. In the next place, the remedy at law included recourse to the court of final resort; and lastly, and principally, the question whether the complainants had an adequate remedy at law, depends on the question, whether in that forum, appropriate relief might have been administered, had the complainants appeared to have been entitled to it.

The order to show cause will be discharged and the bill dismissed, with costs.

LEWIS vs. THE CITY OF ELIZABETH and AITKIN,
Comptroller.

1. Under an injunction bill against city authorities to restrain a sale of complainant's land to pay an alleged fraudulent and void assessment for street improvements, an order for proof was entered by default. Order set aside on the ground of surprise.

2. A municipal corporation has a much stronger claim for relief against the consequence of delay and negligence of the officer upon whom the charge of its litigation is devolved, than an individual acting for himself in his own interest, would have against the consequences of the neglect of his solicitor or counsel.

3. A party aggrieved by an illegal assessment, has his remedy at law, and when that is adequate and ample, equity will not interfere.

4. In this case no fraud is shown, except by vague and inconsequential statement, and if there was, the complainant is bound by his laches. The improvements for which the assessment was made, were all paid for long before the bill was filed.

5. No irreparable injury will be done by enforcing the payment of the assessment.

On motion to set aside order for proofs, and to dismiss the bill.

Lewis v. City of Elizabeth.


Mr. R. E. Chetwood, for the motion.

Mr. W. J. Magie, contra.

THE CHANCELLOR.

On the 15th of January, 1873, the complainant filed his bill, stating that on the 26th of July, 1870, he was the owner of a part, and at the time of filing the bill, the owner of the whole, of a lot of land in Elizabeth, lying on Reid street; that that property there had been assessed \$7307.06, by an assessment, ratified October 16th, 1871, for grading and paving that street from Magnolia street to Elizabeth avenue, and flagging and flagging the sidewalks; that on the 26th of July, 1870, the city made a contract for the work with the Nicholson Pavement Company of New York; that the contract was only for furnishing and laying the pavement, (which was to be a wooden one and was the subject of a patent right,) and also, for the rest of the work, the grading, curbing and flagging; that the work was all included in one ordinance, and that proposals were called for by the city for the entire work in one bid; that by this action, those who might have been qualified for the grading, curbing and flagging, or some or one of them, were prohibited from so doing, and the above mentioned company, who controlled the right to lay the pavement, were necessarily the only bidders for the entire work, and that this was contrary to the one hundred and twenty-third section of the city charter, which provides that all contracts for doing work or furnishing materials for any improvement under the charter, exceeding in amount \$100, shall be advertised for three weeks in a newspaper published or circulating in the city, and shall, at all times, be given to the lowest bidder, he or they giving ample and satisfactory security for completing the work. The bill further states that it had recently, before the filing of the bill, come to the knowledge of the complainant, that the amounts charged for the work, were very much in excess of a fair price, and that the company immediately sub-contracted the job to other parties for from

Lewis v. City of Elizabeth.



\$3000 to \$4000 less than the price the city had agreed to pay. It also alleges that the above mentioned assessment had been put on the complainant's property in respect of that work, and that by reason of the facts above stated, the assessment is rendered void, but yet is an apparent lien on the complainant's premises. The bill further states that the comptroller of the city threatened to sell the complainant's land, under the charter, for payment of the assessment, the sale to take place on the 15th of January, 1873. The complainant, by the bill, insists that the assessment was fraudulent and void and ought not to be maintained as against him or his property, and that it constitutes no valid lien on the latter, and he alleges that if the sale be allowed to take place, it will create an apparent lien and a cloud on his title and diminish the saleable value of the property. The bill prays an injunction merely. The injunction was refused by the late Chancellor, but an order to show cause with a temporary stay of proceedings was granted by him. An order for proofs was entered by default in July, 1873, but no subsequent steps were taken in the cause until the motion now under consideration. The defendants allege that the omission on their part to take any action in the cause, was attributable to the negligence of the counsel of the city, the law officer who was charged with the defence of the suit, and that the order for proofs is a surprise to them. That order, ought to be set aside, on the ground of surprise. The negligence of the officer, upon whom the charge of its litigation is devolved by a municipal corporation, furnishes a much stronger claim to relief, on such an application as this, than the neglect of counsel would in the case of an individual acting for himself in his own interest.

The merits of the case as presented by the bill, were very fully discussed by the counsel of the parties on the argument, and under the circumstances, I deem it proper to consider and dispose of the application for dismissal, made by the defendants' counsel.

The complainant, if he felt aggrieved by the ordinance and

Lewis v. City of Elizabeth.

proceedings brought in question in this suit, had a remedy at law by *certiorari*, which would have been adequate and ample for his relief, against any illegality or material irregularity or informality in them. He does not appear to have availed himself of that remedy, nor does he even offer any reason or excuse for not having done so. Again, his application to this court has been marked by delay, which he does not attempt to account for. The assessment was ratified on the 16th of October, 1871, yet he took no action in this court until the 15th of January, 1873, more than a year afterwards, and nearly three years after the passage of the ordinance under which the contract was made and the work done. The bill does not question the right of the city to pass the ordinance or to make the contract, but alleges that the ordinance, in contravention of a provision of the charter intended to secure competition for such work, combined the curbing, grading and flagging with the paving, and so prevented competition. This objection was patent on the face of the ordinance, and the complainant might have availed himself of it at law, as a ground for setting aside the ordinance. Nor, beyond the mere charge, is there any fraud set up in the bill. There is, indeed, nothing which looks in that direction, unless it be the statement that it had recently come to the complainant's knowledge, that the amounts charged for the work were very much in excess of a fair price, and that the company immediately after they obtained the contract, sublet the job at a profit of from \$3000 to \$4000. This vague and inconsequential statement, is by no means sufficient to induce this court to hold the case. Besides, for relief on any such grounds, it was the duty of the complainant to be diligent in his application here. *Bond v. Mayor, &c., of Newark*, 4 C. E. Green 376; *Liebstein v. Mayor, &c., of Newark*, 9 C. E. Green 200. It does not appear by the bill, when the work was, by the terms of the contract, to be finished, but it was, undoubtedly, not only completed but paid for, long before the bill was filed, for the assessment was ratified in October, 1871. The bill does not put the claim for relief distinctly on the ground of

Dinsmore v. Westcott.

fraud, but alleges that by reason of the facts set forth, (all of which are above referred to,) the ordinance is void, and that though the assessment is no actual lien, it is an apparent one, and, therefore, a cloud on the complainant's title. The objection to the ordinance and proceedings, is an objection to their legality, and is apparent on their face. There is no allegation of irreparable injury to be inflicted by enforcing the payment of the assessment, nor would any in fact be done. There is no ground for the interference of this court. *Morris Canal and Banking Company v. Jersey City*, 1 *Beas.* 252; *Liebstein v. Mayor, &c., of Newark*, *supra*.

The order to show cause will be discharged, and the bill dismissed, but without costs.

DINSMORE vs. WESTCOTT and others.

1. A mistake in ante-dating a subpoena, when in fact it was not issued before the filing of the bill, may be corrected.

2. A defect in the affidavit of mailing a copy of the notice to an absent defendant, in not showing that the place to which it was directed was the defendant's post office address, may be remedied by supplying the proof by way of amendment.

3. A party claiming an interest in premises against which a foreclosure has been commenced, under a deed not recorded at the filing of the bill, is bound by the proceedings in the suit, so far as the property is concerned, as if he had been made a party to the suit. His not being a party to the suit, does not affect the title of the purchaser at the sale.

On petition to be relieved from bid at sheriff's sale under foreclosure of mortgage.

Mr. R. Wayne Parker, for petitioner.

Mr. A. Dutcher, contra.

Dinsmore v. Westcott.

THE CHANCELLOR.

The petitioner purchased the mortgaged premises at the sheriff's sale under the execution in this cause. He now applies to be relieved from his bid, on the ground that the proceedings are irregular, informal, and insufficient to bar the right of redemption of the owner of the premises. The grounds of objection, more particularly stated, are, that the *pœna ad respondendum* appears, by its teste, to have been issued before the bill was filed; that the proceedings against Abram H. Schenck, as an absent defendant, do not show that the directions of the rule of court in that behalf have been followed, inasmuch as the affidavit on file does not show that the residence and address therein mentioned were the true residence and post office address of Schenck; and that it appears that long before the bill was filed, Schenck, who was made a defendant as owner of the equity of redemption, conveyed the mortgaged premises in fee simple to Anthony W. Dimock, who, also before the bill was filed, conveyed them in fee to Stephen Sweet, who, it is alleged by the petition, previously to the last mentioned conveyance, had been tenant of the property. The petitioner's counsel insists that this tenancy of Sweet, was such notice of Sweet's title to or interest in the lands, as rendered it necessary for the complainant to make him a party to the suit.

As to the first objection: The solicitor of the complainant swears that the subpoena was, in fact, issued on the 6th of May, the day on which the bill was filed, and not on the 1st, and that if it bears date on the latter day it is a mere clerical error. The subpoena, then, was not, in fact, issued before the filing of the bill. The mistake in the date may be corrected.

As to the second: The order for publication directs in the usual way, that notice of it shall, within twenty days from the date of the order, be served on the defendants, personally, by leaving the same at their residence, with a person of the family, or that, in default of such service, the notice be published, within the twenty days, in a designated news-

Dinsmore v. Westcott.

paper, and that a copy of the notice be also mailed within the same time, to the absent defendants, directed to their post office address, if the same could be ascertained. The notice was duly published, and it appears by the affidavit on file, that a copy of it was sent, within the prescribed time, in an envelope, pre-paid, by mail, addressed to Schenck, at the city of New York. The defect in the affidavit is that it does not show that that was Schenck's post office address. If it was, the proof may be supplied by way of amendment. *Rogers v. Rogers*, 3 C. E. Green 445.

As to the third objection: The act "relating to the Court of Chancery," approved March 17th, 1870, (*Pamph. Laws*, 1870, p. 40,) provides, that in any suit for the foreclosure of a mortgage upon, or which may relate to, real or personal property in this state, all persons claiming an interest in, or an encumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien, or any instrument which, by any provision of law, could be recorded, registered, entered, or filed in any public office in this state, and which shall not be so recorded, registered, entered, or filed, at the filing of the bill in such suit, shall be bound by the proceedings in such suit, so far as said property is concerned, in the same manner as if he had been made a party to and appeared in such suit and the decree therein made against him as one of the defendants therein. It further provides, that such person may, on causing his conveyance, mortgage, assignment, lien claim, or other instrument, to be recorded, registered, entered, or filed, as provided by law, cause himself to be made a party to the suit, by application on petition.

When the bill in this cause was filed, Schenck appeared, by the records of the county in which the premises are situated, to be the owner of the equity of redemption. It appears that by deed dated and acknowledged August 31st, 1871, Schenck conveyed the property in fee simple to Anthony W. Dimock, who appears to have conveyed it in fee simple to Stephen Sweet, by deed dated May 1st, 1873, but not acknowledged until the 9th of that month. Neither of these

Dinsmore v. Westcott.

ds was recorded until the 22d of January, 1874—four months after the final decree was entered in the cause, when y were both recorded. Sweet, not having caused his deed be recorded, is, by the provisions of the act above quoted, and by the proceedings, so far as the property is concerned, the same manner as if he had been made a party to the and the decree therein made against him as one of theendants.

The petition states that previously to the date of that deed had been tenant of the property, and that the “petitioner advised, that by the tenancy of Sweet such notice of his e may have been given to all the world, that Dimock or eet should have been made party to the bill as owner.” e petition is not evidence of the facts stated therein. *Carter v. Muchmore*, 2 *McCarter* 123. If it were, it merely es that Sweet had been tenant of the property previously the conveyance to him. When he was tenant, or when, tenancy expired, does not appear. The petition nowhere ages that he was in possession of the premises when the l was filed. His tenancy, if any there was, had then sed, for he was then, according to the petition, the owner the property, in fee. The deed to him is dated May 1st, 73, and it is presumed to have been delivered at its date. e complainant’s solicitor swears that he had no knowl- ge of any person being the owner, or in possession of, or ving any interest in the premises, except Schenck, until g after the commencement of the suit, and in August, 73, when Sweet called on him and requested delay in the eedings, stating that he had purchased the premises and nted time in which to raise the money to pay off the mort- ge; that he asked Sweet why he did not put his deed on ord, if he had one, and he could make no satisfactory an- er, and the solicitor then told him that his keeping his ed off record was a suspicious circumstance, and that he, e solicitor, was not inclined to grant him any indulgence, he did not appear to have any rights in the premises. his was before the master’s report in the cause was filed.

Middleton v. New Jersey West Line Railroad Co.

Yet Sweet made no application to be admitted a defendant. He is bound by the decree. This matter will stand over to give the complainant an opportunity to make the amendments above allowed, and when they shall have been made the petition will be dismissed, but without costs.

MIDDLETON vs. THE NEW JERSEY WEST LINE RAILROAD COMPANY.

1. A receiver under the supplement of March 17th, 1870, to the act to prevent frauds by incorporated companies, directed to sell the property, part free from encumbrances, and part subject thereto, and the order and manner of sale specifically directed.

2. Question of constitutionality of that act not passed upon.

On application for order directing the receiver to sell the property of the company free from the encumbrance of the mortgages and other liens on the same.

Mr. Joseph Coult, for the receiver.

Mr. Vanatta, *Mr. McCarter*, and *Mr. Williamson*, for the holders of bonds secured by mortgage on the railroad.

Mr. J. F. McGee and *Mr. Cortlandt Parker*, for the trustees under that mortgage.

Mr. Gilchrist, Attorney-General, for the trustees for the support of public schools.

THE CHANCELLOR.

This is an application made under the supplement of March 17th, 1870, (*Pamph. L.*, 1870, p. 55,) to the act to prevent frauds by incorporated companies, for an order directing

Middleton v. New Jersey West Line Railroad Co.

he receiver to sell the property and the chartered rights, privileges, and franchises of the New Jersey West Line Railroad Company, free from all liens and encumbrances thereon.

By the supplement above referred to, power is given to the Chancellor to appoint, on application of any creditor, mortgagee, or stockholder of any railroad, canal, or turnpike company, incorporated under the laws of this state, which has become insolvent or failed, for ninety days after the same has become due, to pay the interest or principal of any mortgage on its property and franchises, a receiver or receivers, or trustees, who is or are to have and exercise all the powers and authority which it is lawful for receivers or trustees to exercise under the original act. And the supplement provides, that it shall be lawful for the receivers or trustees to sell or lease the canal, railroad, or turnpike belonging to the company, together with all the chartered rights, privileges and franchises of the company, and that the purchaser or purchasers, lessee or lessees, of such work, chartered rights, privileges, and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of the company, or during the term in the lease specified, in as full and ample a manner as the stockholders of such company could or might have enjoyed the same, subject, however, to all the restrictions, limitations, and conditions contained in the charter; and upon filing in the office of the secretary of state, within six months after such sale or lease, a certificate that they accept the charter of the company whose property has been sold or leased, under some corporate name, different from that of the company, the purchasers or lessees shall become a corporation under the name so specified, with all the powers, rights, privileges, and franchises of the former company. The supplement further provides, that the lessees, or purchasers, or corporation so formed, shall hold and enjoy the property and chartered rights, privileges, and franchises, free and clear of all debts, claims, and demands of creditors, mortgagees, or stockholders, who are to look only to the fund arising from such lease or sale; and the money

Middleton v. New Jersey West Line Railroad Co.

so collected is to be paid into this court. It further provides, that where the property is subject to a mortgage, the Chancellor may, with the consent of the plaintiff, or without such consent, if the principal is not due, direct a sale or lease to be made, subject to the mortgage.

The receiver appointed by this court for the creditors and stockholders of the New Jersey West Line Railroad Company, a corporation under the laws of this state, applies for an order authorizing him to sell the property and chartered rights, privileges, and franchises of the company, free from all debts, claims, and demands of creditors, mortgagees, or stockholders. The property is the railroad and land purchased for its construction, and the goods and chattels used on the railroad. It is subject to two mortgages, one only on certain land under water at Jersey City, for \$80,000, and interest, held by the trustees for the support of public schools, and the other, claimed by the mortgagees (who are trustees for bondholders,) thereunder, to be upon all the property, chartered rights, privileges, and franchises of the company, but admitted to be subsequent to the first mentioned mortgage.

The mortgagees under the mortgage on the land under water, object to the sale of the property clear of their mortgage, on the ground that they are unable to protect their interest thereunder, and insist that if the sale be ordered, it should be subject to their mortgage. The mortgagees under the other mortgage object to the sale, on the ground that it would deprive them of part of their remedy for the security and collection of their debt, and that the supplement is in contravention of the provision of the constitution of this state, which prohibits the legislature from passing any law depriving a party of any remedy for enforcing a contract which existed when the contract was made. They insist also, that the sale, if ordered, would not be lawfully or equitably ordered to be made subject to the mortgage on the land under water, but clear of theirs. It is obviously of very great importance to the parties in interest, that a final deter-

Middleton v. New Jersey West Line Railroad Co.

mination of the questions raised on this application be had at the earliest practicable moment, and before sale of the property. The constitutional question was passed upon in this court, in *Potts v. N. J. Arms and Ordnance Co.*, 2 C. E. Green 395, in reference to the supplement of March 13th, 1866, (*Nix. Dig.* 409, § 24,) to the act to prevent frauds by incorporated companies. That supplement provides that where the property of an insolvent corporation, in the hands of a receiver or trustees appointed under the original act, is encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value, pending the litigation thereupon, the Court of Chancery may order the receiver or trustees to sell the same, clear of encumbrances, at public or private sale, for the best price that can be obtained, bringing the money into the Court of Chancery, there to remain, subject to the same liens and equities of all parties in interest as was the property before it was sold, and to be disposed of as the said court, by its decree, shall order and direct. The constitutionality of that act was there maintained. The subject was considered also in the Supreme Court, in *Rader v. Southeastern Road District, &c.*, 7 Vroom 273. See also *Martin v. Somerville Co.*, 3 Wall. Jr. 206. Whichever way, however, the decision of this court may be, an appeal will be taken by the one side or the other. In order, therefore, to prevent any delay, and to advance the matter towards its final determination, and that it may, if opportunity be afforded, be heard at the next term of the Court of Errors and Appeals, I deem it proper to make at once, without an expression of opinion, an order *pro forma*, in the premises, from which an appeal may be taken.

There will be an order that the receiver sell at public auction, all the property, rights, privileges and franchises of the company, in the following manner :

First. In one parcel, all the corporate rights, privileges and franchises of the company, with its railroad track, right of way, rolling stock and all the property of every kind belonging to the company, included in and covered by the

Prince v. Prince.

mortgage given by the company to Benjamin G. Clark and Theodore F. Randolph, trustees, including in the parcel the franchise or right of the company to extend its railroad from Newark to a point in Hudson county ; which property, rights, privileges and franchises shall be sold absolutely freed and cleared of and from all liens and encumbrances of every kind and description whatsoever.

Second. Separately and in one parcel, that portion of the property owned by the company known as the water front, situate at Communipaw bay, subject to the mortgage held by the trustees for the support of public schools, and to all other liens and encumbrances now on the same.

Third. In such parcels as he may deem most advantageous, the other property held in trust for the company, which is to be sold subject to all the legal and equitable liens thereon, if any.

Fourth. All the personal property of the company not covered by the mortgage of Messrs. Clark and Randolph, trustees, in such parcels as he may deem most advantageous ; the property to be sold free and clear of all liens and encumbrances.

PRINCE vs. PRINCE.

A variance in the probata, of time, place and person, from the allegata, is fatal to a decree for divorce on the ground of adultery.

On petition for divorce.

THE CHANCELLOR.

The decree for divorce from the bond of matrimony prayed for in this cause, must be denied. There is no agreement between the allegata and the probata. The petition alleges acts of adultery committed by the defendant on two occasions in the city of New Brunswick ; one, on or about the 1st of

Johnston v. Corey.

December, 1873, with a man whose name and aliases are given, and the others on or about the night of the 17th of January, 1874, at a fire engine house, with divers other persons, whose names are unknown to the petitioner. The proof is of adultery with a man, whose name is unknown to the witness, at the county jail in New Brunswick, in March, 1874, and of the same crime with a man, whose name is unknown to the witness, in January or February, 1874, in the court house yard, in that city. There is no proof whatever to sustain the charges made in the petition.

JOHNSTON and JOHNSTON vs. COREY.

1. It is the established rule of this court, that an injunction will not be dissolved for new matter in avoidance alleged in the answer, not responsive to the bill.

2. When the defendant in an injunction bill to restrain his proceeding to collect a judgment recovered against the complainants, has not answered a charge of insolvency, and a dissolution of the injunction might leave the complainants remediless in the premises, and compel them to bear burdens from which, in equity, they should be relieved, the injunction will be retained until the hearing.

On motion to dissolve injunction, on bill and answer and affidavits.

Mr. Jacob Vanatta, for the motion.

Mr. H. C. Pitney, contra.

THE CHANCELLOR.

The defendant moves to dissolve the injunction, on bill and answer. The complainant, Robert S. Johnston, and the defendant were co-partners together under the firm name of Johnston & Corey, from May, 1872, to April 1st, 1873, when

Johnston v. Corey.

the co-partnership was dissolved by mutual consent. The business of the firm was keeping a boarding-house and selling goods in a building erected by them for the purpose, on the Asylum grounds, near Morristown. Johnston was a contractor for work on the Asylum buildings, then and still in the course of construction, and employed a large number of workmen there, accordingly. To provide board and lodging for these men and derive the profit therefrom, were the principal objects of the co-partnership. The building was of wood, of considerable dimensions, but of rude construction, both externally and internally. The co-partners furnished it only with such furniture as was absolutely necessary for the business. The store for the sale of merchandise was in part of the building. The firm stocked it, and the business of the sale of merchandise was carried on there during the continuance of the co-partnership. At the dissolution of the firm, Corey, by agreement between him and Johnston, continued to occupy the premises and use the furniture on his own account, for the same purposes for which they had been used by the firm. At the time of the dissolution, April 1st, 1873, Johnston associated with him as partner in his contract, the other complainant, William Johnston, Jr. It was part of their agreement, as they allege, that the liability of the former, in respect to the debts of Johnston & Corey, should be equally shared by them, and that William Johnston, Jr., should be entitled to one-half of Robert S. Johnston's share of the profits of the business of the firm of Johnston & Corey. To this arrangement, they say, Corey consented. From the time of the dissolution to about the 10th of May, following, Corey continued to keep the boarding-house and store. From the last mentioned date to about the 1st of June, following, he did not give the business his personal attention, owing, as he alleges, to his illness. On or about the last mentioned day, the complainants took possession of the building and proceeded to carry on the business of the boarding-house and store there, on their own account. Corey says they took possession of a very considerable amount of goods belonging to

Johnston v. Corey.

him, which were then in the store, and disposed of them for their own account. From the dissolution, and as it appears up to the 1st of May, following, Corey boarded one hundred and eighteen of the workmen of the complainants, for which he was entitled to receive from the latter, by reason of their assumption of the debt, \$951.69, and during the same period he sold to workmen of the complainants, goods out of the store to the amount of \$340.77, for which, by like assumption, the complainants were liable to him. On the 5th of June, 1873, he commenced a suit against the complainants to recover these amounts, with interest, in the Circuit Court of Morris county, and on the 19th of August, following, recovered judgment against them by default, for the sums so claimed, with interest from the 10th of May, next preceding, and costs of suit. On the same day, an execution was issued on the judgment, and levied on the property of the complainants. They then filed their bill to enjoin him from enforcing payment of the judgment, on the ground that the arrangement by which he was permitted to occupy the building and use the furniture on his own account, after the dissolution, was based on his agreement with the complainants, to pay off, by means of the board of the workmen and the sales of goods to them, his share of the debts of Johnston & Corey; the money to become due to him on which accounts, from their workmen, the complainants were to retain, as far as necessary for the purpose, to be applied to so much of the outstanding indebtedness of the firm of Johnston & Corey as he was bound to pay. This indebtedness, they allege, is considerable, and they also allege that they have been unable, by reason of his keeping exclusive possession of the books and papers of the concern, to ascertain its amount. They charge upon him, fraudulent dealing, among other things, in appropriating to his own use the property of the firm, without accounting therefor, and in creating debts in the name and on the credit of the firm, on his own account. They allege that he is entirely insolvent, and that, although since the dissolution he promised to indemnify the complainants against his share of

Johnston v. Corey.

the indebtedness of the firm, by giving them security therefor, he has broken his promise and refuses to furnish the security. On the filing of the bill an injunction was issued, on terms of giving the bond required by statute in such cases. The defendant has answered, denying the fraud charged upon him. He denies that he has either refused to account with the complainants or to permit them to examine the books, but alleges that on the other hand, he has been desirous of coming to an account of the partnership affairs, and has so informed them, and says, that they have been denied no access to or opportunity of examining the books. He states that at the dissolution, the assets of the concern amounted to \$4871.75, and the debts to \$3143.82, and that since then he has collected of the debts due to the firm, \$171.68, and paid of the firm's debts, \$285.03. He further states that at the filing of the answer, the assets amounted to \$4710.07, and the whole unpaid indebtedness to \$2858.79, leaving a surplus of \$1851.28, from which is to be deducted the amount of \$113.35, for debts paid by him since the dissolution, over and above his receipts, and a clear balance will be left of \$1737.93, applicable to the payment of the capital put into the concern. In this exhibit of the affairs of the firm, he puts down the building at \$2337.22, and the furniture at \$864.32, and the debts due to the concern are stated to be \$278.06. For these debts he alleges Robert S. Johnston is liable by reason of his assumption thereof, they being due, as he states, from Johnston's workmen, from whose wages Johnston was, by agreement between him and Corey, to have retained the amount. Whether the assets of the firm are sufficient, according to Corey's statement in the answer, for the payment of their debts, depends on whether the valuation of the building and furniture is just, and on the collectibility of the debts just referred to due to the firm. The building and furniture are set down at what Corey says is their cost. On the dissolution of the firm they would probably have been disposed of by ~~but~~ for the arrangement by which he was to be permitted ~~them~~. It is not at all probable that on such sale, the

Johnston v. Corey.

them could have realized cost for the building or furniture. The loss on them would probably have been very great. The building is merely a rude temporary structure, erected for a special purpose, on land owned by the state, and the use to which the furniture had been subjected, would probably have rendered it of no considerable value. The defendant, however, seeks to justify these valuations, by the fact that, as he alleges, he was unjustly dispossessed of the property by the complainants, who took it to their own exclusive use, not only without his consent, but against his will and in utter disregard and violation of his rights. These valuations, therefore, are dependent on the facts alleged in support of them, which appear for the first time in the cause, in the answer. The valuations together amount to \$3201.54. This new matter is met by affidavits on the part of the complainants, one of which, made by a person very competent to value the property, fixes the original cost of the building at about \$1400, and its value, if taken down and removed, at not over \$250. By these affidavits it appears that the furniture had been greatly depreciated in value by use, at the dissolution, and would then have brought at a sale but a very inconsiderable sum. The facts themselves by which the defendant seeks to justify his valuations, are denied by these affidavits. It is enough to say that those facts are new matter. So, also, of the defendant's statement in regard to the liability of Robert S. Johnston for the payment of the debts due to the concern, which the defendant says, amount to \$278.06, and all of which he sets down as collectible, because of the alleged liability of Robert S. Johnston to pay them. It is the established rule of this court, that an injunction will not be dissolved for new matter in avoidance alleged in the answer, not responsive to the bill. *West Jersey Railroad Company v. Thomas*, 6 C. E. Green 205, and cases there cited.

The defendant has not answered the charge of insolvency made against him in the bill. The case is an appropriate one for exercising the restraining power of the court. *High on*

Pickert v. Ridgefield Park Railroad Co.

Injunctions, § 829; *Kerr on Injunctions* 169; *Gold v. Canham*, 1 Ch. Ca. 311. To dissolve the injunction and permit the defendant to proceed to collect the judgment he has recovered, might be to leave the complainants practically remediless in the premises, and to compel them to bear burdens, from the liability to which they should in equity, under the circumstances, be relieved. Corey, on the other hand, in addition to the lien of his judgment and execution, has the security which by law is required to be given, on application of a defendant to this court to stay proceedings at law in a personal action after verdict or judgment.

The injunction should be retained until the hearing. The motion to dissolve is denied, with costs.

PICKERT vs. RIDGEFIELD PARK RAILROAD COMPANY.

Where a railroad company had entered into a written agreement for their right of way, with the person who was the ostensible owner, and also the owner of record, of the property over which the right of way was sought, and by virtue of a license in such agreement, entered into possession and graded their road-bed and proceeded to lay their track, an injunction to restrain them from the use of the property at the suit of the wife of such ostensible owner, who claimed that at the time of making such agreement, she was the real owner of the property by deed unrecorded, and that the agreement and license were made without authority, was refused; it appearing that she was cognizant of the entry of the company and of their work upon the property, and gave them no notice of her ownership, nor repudiated the agreement or license, and the company were guilty of no negligence.

On final hearing on pleadings and proofs.

Mr. S. Tuttle, for complainant.

Mr. M. Knapp, for the company.

Pickert v. Ridgefield Park Railroad Co.

THE CHANCELLOR.

The bill in this case was filed to restrain the company from entering upon, taking or using, without the complainant's consent, a piece of land of the width of one hundred feet, and of the length of about twelve hundred feet, part of a farm of which the complainant claims to be the owner ; and from proceeding further in the construction of their railroad over it, and from laying their rails upon it and running their locomotives or cars over or upon it. It appears that when the bill was filed, the company were in possession of the land in question, and were occupying it for the purpose of their railroad, of which it was part ; that they had made an excavation in it of the width of seventy-five feet and of the depth of about nineteen feet, for its entire length, and were about to lay their rails upon it for their railroad. The whole of the railroad in this state was then graded, part of the track laid, and the road ready for laying the track on the part of it on which the track had not yet been laid. It appears also, that the company had so been in possession and had occupied the land for about a year before the filing of the bill. They had entered into possession under an agreement under seal, made on the 14th of February, 1872, between them and Rozel F. Pickert, the complainant's husband, by which, in consideration of one dollar to him paid by the defendants, and in further consideration of the benefits to him of the location of a railway thereon, he covenanted and agreed with them that he would grant, convey and release to them, by a good and sufficient warranty deed, upon being paid therefor the consideration thereafter mentioned, the strip of land in question ; the railroad to be built where it was then located, and the consideration to be paid to be determined by arbitration, and in case of failure of the arbitrators to agree, by umpirage. The agreement further provided that the company might "enter on the land and commence the work of construction before the formal conveyance" might "be executed, they doing no unnecessary damage." The complainant alleges that when this agreement was made, she was the owner of the land, and

Pickert v. Ridgefield Park Railroad Co.

she insists that it is not binding on her ; that she did not authorize her husband to make it, and that she did not know of its existence until after the company had begun their work on the land. It appears that the price of the land was never fixed ; that in August, 1872, some months after the company had begun work on the land, the parties to the agreement each chose an arbitrator to fix the price ; that these two, being unable to agree upon it and failing to agree on an umpire, the arbitration was broken up in September or October following, by the refusal of the arbitrator, appointed by Pickert, to serve. The company, by their answer, express an earnest desire to have the value of the land ascertained, either in the manner provided in the agreement or in any other proper and legal mode, and declare themselves ready and willing to pay it when ascertained to the person or persons entitled to it. They allege that it is no fault of theirs that the price had not been fixed before the bill was filed, but that it was by reason of the unwillingness of Pickert to carry out the agreement. On the filing of the bill, an order to show cause why an injunction should not issue according to the prayer of the bill, was granted. The order, however, was not made absolute, and the defendants proceeded to lay their track over the land and to use it as part of their road, of the main line of which it is part.

That the company, in good faith, entered into the occupancy of the premises in question, there is no room to doubt, and it seems equally clear that in treating for the land, they presumed, and had good reason to presume, that the complainant's husband was the owner of the property. The negotiations were all conducted by him. He, indeed, testifies that he apprised the agent of the company from the beginning of the negotiations, that his wife was the owner, but the agent swears that neither the complainant nor her husband, gave him any intimation that the former owned the property, until after August, 1872, and then the grading of the whole road was almost all done. The witnesses, Bartholomew Pickert and Henry C. Cooke, are evidently mistaken as to

Pickert v. Ridgefield Park Railroad Co.

the time when the conversations, as to which they testify, took place. The time they fix is a year too early. The conversations probably took place after the arbitration was broken up. Henry S. Downs, the arbitrator chosen by Mr. Pickert, had not, up to the time when he declined to serve further, which was in the fall of 1872, heard that Mrs. Pickert had an interest in the property. Besides, the agreement itself, in all respects, treats the property as Mr. Pickert's. There is nothing whatever in it to indicate that he was not the sole and absolute owner of the land, but on the other hand, it deals with the premises as being in all respects his sole and absolute property. And again, it appeared by the records of Bergen county, in which the land is, from the beginning of the negotiations down to August, 1872, that Mr. Pickert had the title to the land. The deed from Pickert to Anna Downing, and the deed from the latter to Mrs. Pickert, these being the conveyances by which Pickert transferred the property to his wife, were neither of them recorded until the 9th day of June, 1873—more than three months after the bill in this cause was filed. The agent of the company testifies that he was at Pickert's house in Harrington township, (the premises in question,) both before and after the signing of the agreement; that he saw Mrs. Pickert on one of those occasions, and that he and she and her husband always talked more or less about the right of way and about the property. He further testifies that in the early part of September, 1871, he called at Pickert's house, in Harrington township, and there met Mrs. Pickert; that he asked for Pickert, and she told him he was not at home; that he told her he was going to put a railway through Pickert's place, and wanted to see him about a right of way; that she told the witness he would have to see Pickert, and to that end she told him where Pickert's place of business was, in New York. Edward K. Alburdis, who was the president of the company when the agreement was made, and was still such when he testified in this suit, swears that he never heard from any source that Mrs. Pickert owned the land, until the work was

Pickert v. Ridgefield Park Railroad Co.

substantially done, and he does not know of any member, officer, or agent of the company having any intimation that she claimed to be the owner of the property before the suit was brought. Delos E. Culver, who was a director of the company, and had the contract for building the whole road, testifies that in the conversations with Pickert, (he had none with Mrs. Pickert,) Pickert spoke of the land as his. Patrick Rehill, who did the grading on the land in question, testifies that in his conversations with Mr. Pickert in reference to the work, (and he talked to him more than once, and on one occasion in the presence of Mrs. Pickert,) he "never understood anything different than that the farm was Mr. Pickert's," and that he always heard Mr. Pickert speak of the farm as his. The insufficiency of the reason given for not recording the two deeds above mentioned, under which Mrs. Pickert claims title, may well lead to the conclusion that her title to the property was intentionally concealed. She claims to have paid to her husband \$4000 for the property. He was a bankrupt, and had failed in business about a year before these conveyances were made. She testifies that the reason why the deed to her was not recorded was because it required so many stamps; that after she paid for the property she was "short" in money matters. But she was then in business in the tea trade in New York, and her husband was with her in that business, and she will not say that this \$4000 did not go into that business. She says she does not know what became of that money, that she does not know positively whether it came back into the business. Pickert testifies that he and his wife did not record the deed because of the expense attending it in the way of stamps, and that she and he were informed that there was an act of Congress doing away with the necessity of stamping deeds, and they supposed if the deeds were not recorded until that act took effect, it would never need stamping, and that they considered it purely a matter of economy between themselves. Now, when it is considered that Mrs. Pickert had capital

Pickert v. Ridgefield Park Railroad Co.

ed in the tea business in New York ; that her husband
d an offer of \$38,000 for the farm of which the strip
d in question is part; that each deed required only
s to the amount of \$4, and that an inspection of the
shows that the deed from Pickert to Downing was
stamped at its date, May 28th, 1871, and that the
was also stamped at the same time with stamps to an
it sufficient, according to the requirements of law, ex-
ifty cents, the worthlessness and insincerity of this ex-
re apparent. Nor is the reason given by Pickert in
stimony for signing the agreement in his own name,
d to any consideration. To the question, " Why did
gn the agreement in your own name?" he answered, " I
just remember that, but I am under the impression
t was because I thought the proposed railroad would
come to be a fact."

conclusion is, that the company did believe, and had
reason to believe, that the property was the property of
t, and that they did not know until some time in the
1872, and after they had almost completed the grading
ir road, that Mrs. Pickert claimed any title to it. In
occupation of the property Mrs. Pickert acquiesced.
attempt is made to show that she merely seemed to ac-
e, and that that apparent acquiescence was due to the
on of her husband, but it does not so appear by her tes-
y. She says, that when the company entered on the
to excavate she knew the fact, and that she made no
on then to their going on the land. She and her hus-
lived on the property while the work was in progress.

asked for her reason for not objecting, she does not
restraint, but says she talked with her husband and he
at he could talk to the company better than she could.
ugh, according to her husband's testimony, she con-
counsel, both in New York and in this state, in regard
matter, her husband sometimes accompanying her and
metimes going alone ; and although she consulted with
iends, some of whom she says, were " railroad people,"

Pickert v. Ridgefield Park Railroad Co.

on the subject, and although, as she testifies, she principally managed the property herself ever since the title was vested in her, yet she never made any objection whatever to the company, to their occupancy of the land, until after they had completed the excavation through it and had laid their rails up to the property, and then her objection was made by means of this suit. I see no evidence on which reliance ought to be placed, that her acquiescence was due to any restraint. According to her own testimony and that of her husband, she was free not only to consult with her friends and relatives on the subject, but with counsel of her own selection, and her husband so far from restraining her in this respect, attended her, as he admits, several times to consult her counsel. Pickert's testimony, that his wife, when he told her of the agreement, was very indignant and said she would consult her father, and did consult other parties; that she never consented to or ratified his proceedings in the matter; and that she insisted on his taking her to the company's office, and said she would go alone if he would not go with her, to see the authorities of the company and object to their pushing their railroad across the farm, is further evidence that she was under no restraint. He says, also, that she did not take measures to stop the construction of the company's road over her premises, because she did not know of the agreement until some months after it was made, and then he assured her frequently that the company would soon be up to see them and settle or have the matter adjusted; that she insisted that it should be done at once, and when she saw the men come on to work, she consulted with her friends as to the advisability of allowing the company to go on with the work without first adjusting the matter.

The sole question before me is, whether this company shall, under the circumstances, be enjoined from the use of their road over the land in question. In the first place, the complainant has an adequate remedy at law, and this court will not interfere by injunction in such a case as this where the complainant has an adequate legal remedy. *Higbie v. Cam-*

Pickert v. Ridgefield Park Railroad Co.

den and Amboy Railroad Company, 5 C. E. Green 435; *Morris Canal and Banking Company v. Fagin*, 7 C. E. Green 430. In the next place, the company have been guilty of no negligence, but appear to have acted with due care and circumspection, and in good faith throughout the whole transaction. They are, under the circumstances, entitled to the favorable consideration of the court. Equity has, in numerous cases, declined to interpose against railroad companies under similar circumstances. In *Deere v. Guest*, 1 Myl. & Cr. 516, it was held that there was no equity to restrain by injunction the owners of a railroad made over the plaintiff's land, from using the railroad after it had been completed, or from interrupting the plaintiff's workmen in removing it and restoring the land to its original state, although the possession of the land for the purpose of constructing the railroad, might have been obtained from a tenant of the plaintiff, by means of circumvention and fraud. In *Greenhalgh v. The Manchester and Birmingham Railway Company*, 3 Myl. & Cr. 784, it was held that the owner of land on which a railway company, empowered by parliament, were about to enter, was not entitled to an interlocutory injunction to restrain them from so entering, if, by his silence and conduct, he had permitted them to carry on their works upon the supposition that they were entitled to enter on and take the land in question. See, also, *Langford v. The Brighton, &c., Railway Co.*, 4 Railw. and Canal cases 69; also *Carson v. Coleman*, 3 Stockt. 106. In *Wood v. Charing Cross Railway Company*, 33 Bear. 290, it was held that where a railway company had, *bona fide*, made a mistake, without culpable negligence on their part, as to the lands they had valued and taken possession of, and the question between the company and the land owner was merely one of value, equity would not, by injunction, stay the works on the property taken, and that the court in such cases has regard to the injury which may be done to the public. In this case Sir John Romilly, M. R., said: "I apprehend the rule of the court in all these matters is this: The legisla-

 Gulick's Executors v. Gulick.

ture empowers the railway company to take the property on paying a reasonable sum for it, but they must not take it arbitrarily, or without giving a fair and reasonable compensation to the owner of the property, and they are bound to put the matter in such a shape that a jury or arbitrator may be able to form an accurate estimate of its value. If a railway company, disregarding the provisions of the act, thinks fit to take possession of the property, to act with a high hand and set the owner in defiance, this court interferes and prevents the company from taking any further step in the matter; but it only does so if the owner comes with reasonable diligence, at the proper time, and without doing unnecessary injury to the company. But, if a company acting *bona fide*, take possession of property by mistake, and it is merely a question of value between the company and the owner, I apprehend the court does not act in the same way, unless it is shown that there has been culpable negligence on the part of the company." The company in the present case are in the daily use, for public travel, of the land in question as part of their railway. This court refused to restrain them on the filing of the bill, and again when the answer had come in. There is nothing in the evidence which would justify the contrary action now. The bill must be dismissed, and I think that, under the circumstances, it should be with costs.

GULICK'S EXECUTORS vs. GULICK and others.

1. A bequest of \$10,000 to a daughter, to be held by testator's executors in trust for her, the interest to be paid to her annually, and if she should marry, and have a child or children, then after her death, the \$10,000 to go to such child or children, passes the funds to her executors, subject to her disposition of it by will, upon her death without issue.

2. The gift of the produce of a fund, without limit as to time, passes the fund itself.

3. Where there is a gift to children or other legatees, the shares being given absolutely in the first instance, followed by a direction to settle the

Gulick's Executors v. Gulick.

shares upon trusts which do not exhaust the whole interest, the legatees take their shares absolutely, subject to the qualifying trusts.

4. And where the testator provides that the portion of his daughters shall be held in trust by his executors or other persons appointed for the purpose, during the life of the daughters, and go to their children or issue, if any such they have, at their decease, this is regarded as a qualification or limitation of the estate of such daughters only as leave children or issue, and will not affect the vested or transmissible character of the shares of such daughters as die without leaving children or issue.

5. The fact of a settlement by testator in such case to the use of a daughter, free from the control of any husband she might have, is no evidence that the testator intended that she should have a life estate only.

6. Where, after an estate has been settled, a trust fund remains in the hands of the executors, separated from the general residue, which they have held for a legatee during life, and on the decease of the legatee several claimants for the fund appear, the costs of a suit instituted by the executors, to determine the ownership of the fund, must be borne by the fund itself.

This cause was argued on bill and answers.

Mr. C. S. Green, for the executors of William Gulick, deceased.

Mr. A. G. Richey and *Mr. B. Gummere*, for the executors of Abby Maria Gulick, deceased.

Mr. J. Wilson, for James H. Gulick and William A. Gulick and wife.

THE CHANCELLOR.

The bill is filed by the executors of the last will and testament of William Gulick, deceased, late of Princeton, in this State, for the construction of a bequest of \$10,000 therein, in favor of his daughter, Abby Maria. The will is dated July 3th, 1855. By it, the testator gave to his son James, \$2000, to be placed out at interest on bond and mortgage; the bonds and mortgages to be taken in the names of his executors, and the interest to be paid annually to James by the executors, for his sole and separate use, and to be in no wise liable for

Gulick's Executors v. Gulick.

his debts, and after his death, to go to his children in equal shares. And he gave to his executors and to the survivor of them, the farm on which the family of his son, William A. Gulick, then lived, together with other real estate described in the will, in trust, nevertheless, that the executors and the survivor of them, should receive the rents, issues, and profits of that real estate, and pay them to William and William's then wife, each and every year during their lives, to their sole and separate use, the same to be in no wise liable to the debts of William; and after the death of William and his then wife, he devised the real estate so held in trust for them, to their children, in equal shares. To his son Alexander, he devised the farm on which the testator then lived, for life, with remainder to Alexander's children in fee, in equal shares. To his daughter Abby Maria, who was unmarried, he bequeathed as follows: "I give and bequeath to my daughter Abby Maria, the sum of ten thousand dollars, to be placed out at interest on bond and mortgage, so soon as my estate can be collected without sacrifice; the bonds and mortgages to be taken in the names of my executors or the survivor of them, in trust for my said daughter Abby Maria, and the interest to be paid annually to her by my said executors or the survivor of them, for her sole and separate use, and in no wise liable for the debts, or subject to the control, of any man she may marry; should she marry, and have a child or children, then, after her death, I give the said ten thousand dollars to such child or children." To his married daughter, Elizabeth H., he gave a like sum, to be placed at interest in like manner, and on the like trust, except that he provided that the bonds and mortgages should be taken in the names of the executors other than her husband, he being one of the executors, and after her death, the money bequeathed to her should go to her children, in equal shares. All the rest and residue of his estate, both real and personal, he gave, devised, and bequeathed absolutely, to his five children above named, in fee simple, in equal shares. He appointed his sons, James and Alexander, and his son-in-law, Edward

Gulick's Executors v. Gulick.

Armstrong, executors. By a codicil to the will, dated February 14th, 1863, he revoked the gift to William, in the residuary section of the will, and instead thereof, gave, devised, and bequeathed the one equal one-fifth part of all the rest and residue of his estate, both real and personal, to his executors in the codicil named, and the survivor of them, but in trust, nevertheless, for the use and benefit of Sarah, the then wife of William, during her life, and to be in no wise subject to the debts or control of William, and after her death, it was to go to the children of her and William absolutely, in equal shares; and, in case any of those children should die in the lifetime of their mother, leaving issue, such issue should take the same share as their parents, if living, would have taken. By the codicil, he revoked the appointment of executors made in the will, and appointed the complainants, Alexander Gulick and Job Olden, executors.

Abby Maria did not marry. She died on or about the 20th of May, 1873, leaving a will by which, after providing for the payment of her debts and funeral expenses, and the erection of a tombstone over her grave, she gave all her property to the children of her sister Elizabeth. Her executor claims the \$10,000 mentioned in the above quoted section of the will. On the other hand, it is claimed that it passed under the will of William Gulick, deceased, to those who are now interested in the residuum of his estate; or, if not, then to his next of kin. The executor of Abby Maria insists that, subject to the qualifying trust and conditional limitation, she took the gift of \$10,000, absolutely. On the other hand, it is insisted that she took only the interest of it for life.

The testator gave to Abby, by the bequest under consideration, \$10,000, to be held by his executors or the survivor of them, in trust for her, and the interest to be paid annually to her by the executors or the survivor of them, for her sole and separate use, and not to be liable for the debts, or subject to the control, of any husband she might have; and he further provided that, if she should marry, and have a child or children, then, after her death, the \$10,000 were to go to

Gulick's Executors v. Gulick.

such child or children. In its terms the bequest is absolute. Besides, the produce of the fund is given to her without limit as to time. That, in this case, passed the fund itself. 2 *Roper on Legacies* 1476, *et seq.*; *Adamson v. Armitage*, 19 *Ves.* 416; *Manning v. Craig*, 3 *Green's Ch. R.* 436; *Haig v. Swiney*, 1 *Sim. & Stu.* 487; *Billing v. Billing*, 5 *Sim.* 232; *Hawkins v. Hawkins*, 7 *Sim.* 173; *Clarke v. Gould*, *Id.* 197; *Humphrey v. Humphrey*, 1 *Sim. N. S.* 536. The testator nowhere provides that the \$10,000 shall go over to any one, or fall into the residue of his estate, in case Abby should not have lawful issue.

The plan of his will manifestly was to give his children equal shares of his estate. All the rest of his children except Abby, were married, and had children living when the will was made. In the case of each of the others, he gives to the parent or parents the use or interest for life, and at his, her, or their death, the fund or the real estate to his, her, or their children. There is no clause of accruer in any instance, and he makes no provision in regard to the fund or property, in case neither the children nor their issue should survive the parent to whom the interest or use for life is given. Abby has no interest under the will in the particular devises and bequests to her brothers and sisters and their children. Equality, therefore, does not require that they should have any in the bequest to her. It is clear from the language of the bequest under consideration, that the testator intended to give the \$10,000 to Abby, settling it on her to protect it against any husband she might have, and securing it, in case she should marry and have issue, to her child or children. Where there is a gift to children or other legatees, the shares being given absolutely in the first instance, followed by a direction to settle the shares upon trusts which do not exhaust the whole interest, the legatees take their share absolutely, subject to the qualifying trusts. And where the testator provides that the portion of his daughters shall be held in trust by his executors or other persons appointed for the purpose, during the life of his daughters, and go to their

Gulick's Executors. v. Gulick.

children or issue, if any such they have, at their decease, this is regarded as a qualification or limitation of the estate of such daughters only as leave children or issue, and will not affect the vested or transmissible character of the shares of such daughters as die without leaving children or issue. *Hawkins on Wills* 267; 2 *Redfield on Wills* 649; *Jarman on Wills* 749, 784; *Whittell v. Dudin*, 2 *Jac. & W.* 279; *Hulme v. Hulme*, 9 *Sim.* 644; *Mayer v. Townsend*, 3 *Beav.* 443; *Jackson v. Noble*, 2 *Keen* 590; *Alston v. Davis*, 2 *Head (Tenn.)* 266. This principle was recognized in *Wurts' Ex'rs v. Page*, 4 *C. E. Green* 365. Abby having died without issue, this qualification or limitation of her estate did not affect its vested or transmissible character. Nor is the fact of the settlement to her use, free from the control of any husband she might have, evidence that the testator intended that she should have a life estate only. *Adamson v. Armitage*, *Whittell v. Dudin*, *Jackson v. Noble*, *Mayer v. Townsend*, *Wurts' Ex'rs v. Page*. The case of *Joslin v. Hammond*, 3 *M. & K.* 110, was relied on by counsel for the residuary legatees and next of kin of William Gulick, as authority for holding that the testator died intestate of the \$10,000 mentioned in the bequest under consideration. That case, however, is clearly distinguishable from this. There the testator gave his whole property to his wife, on condition that she should pay an annuity to his mother, for the life of the latter, and he directed that at the death of his wife the whole of his property should be equally divided between those of his children who might survive her. He provided that in case of the re-marriage of his wife, each of his children on arriving at the age of twenty-four should be paid £400. He left one child surviving him, and a posthumous child was born. Both died in the lifetime of the widow, without issue. The widow married again, and died, leaving her husband surviving her. It was held that in the events which had happened, the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it. The decision in that case was put

Gulick's Executors v. Gulick.

upon the ground, that from the whole context of the will it was apparent, that it was the intention of the testator, that in no event the wife should have other than a life estate, and that it was not a probable intention to be imputed to him, that if his children died in the lifetime of his widow, leaving families, she, on her second marriage, should enjoy the whole property. In the case before me there is nothing, either in the terms of the bequest or in the context, to indicate that the testator intended that Abby should have no more than a life interest. The testator not only begins the bequest by giving her the money, absolutely, but follows that gift by an unlimited gift of the interest of the money, and making no limitation over to any person *in esse*, he merely declares a limitation dependent on the happening of a contingency. He does not give \$10,000 to Abby for life, providing that if she marry and have issue, the money is to go to such issue; but he gives the money to her, settling it to her use, with a limitation over in case a certain contingency shall happen.

The testator evidently did not intend to die intestate of the money mentioned in this bequest, and it is difficult to conceive why, if his intention had been that Abby should have a life interest only, he did not, when dealing with the fund, in view of the contingency alluded to and with the possibility if not the probability before him that she would not have issue, give direction to the fund at her death, in the event of her dying without issue. The probability that she would not marry, and that if she did, she would not have issue, seeing that she was, at the date of the will, well advanced in life, must have presented itself to him.

There will be a decree that the fund be paid over, with its accumulations, to the executor of Abby.

The costs in this case should be paid out of the legacy of Abby Maria. The estate of the testator, William Gulick, has been long since settled, and the legacies have either been paid over or are held in trust, according to the directions of the will, and the shares in the residuum have been dealt with in like manner. Though the costs of this suit may be re-

Citizens Mutual Fire and Marine Insurance Co. v. Brittan.

garded as "costs of executing the will," seeing that the executors, being uncertain as to who is entitled to the money in question, have come into court for directions, yet, under the circumstances, it seems equitable in this case, to follow the rule as to costs on interpleader. The executors are trustees for a fund which they have held in trust for the legatee during her life. On her decease, there appeared divers claimants of the fund, and this suit was instituted for the purpose of determining the ownership of it. It is just that it should bear the expense. *Jenour v. Jenour*, 10 Ves. 562. In that case it was held that if, after a residuary legatee has paid out of the bulk of the estate all that it is incumbent on him to pay, a question arises as to the interest in a legacy which has been clearly reserved from the bulk, the expense of questions touching that fund, ought to be thrown on the fund itself.

THE CITIZENS MUTUAL FIRE AND MARINE INSURANCE
COMPANY vs. BRITTAN and others.

Decree and execution for sale of mortgaged premises amended, by reducing the amount decreed to be due, by the amount of interest which had been paid on the mortgage, but not allowed. A further reduction by the amount of an alleged premium for an extension of the time of payment of the mortgage, disallowed, such money having been paid to the then holder of the mortgage, partly as compensation for inducing the complainants to purchase it, and partly as indemnity against the loss which he should sustain in the sale.

On order to show cause why final decree and execution thereon, for sale of mortgaged premises, should not be amended.

Mr. J. Whitehead, for defendant, Longley.

Mr. E. W. Ward, for complainants.

Citizens Mutual Fire and Marine Insurance Co. v Brittan.

THE CHANCELLOR.

The defendant, Longley, owner of the mortgaged premises, applies to have the final decree and *feri facias* thereon, for the sale of those premises, amended, by reducing the amount decreed by the former to be due to the complainants, and by the latter directed to be raised accordingly. The controversy between the parties is with regard to the interest which became due upon the mortgage in suit in this cause, on the 17th of September, 1870, the 17th of March, 1871, and the 17th of September in the last mentioned year. It is admitted that all of the interest due at the first mentioned date, has been paid, except \$51.66, which it is claimed is still unpaid. The mortgaged premises were sold and conveyed by Hugh Holmes to Samuel B. Brittan, on the 17th of March, 1869, and the latter then, with his wife, gave to Holmes the mortgage in suit, for \$5500 of the purchase money of the property. It was payable in one year from its date and bore interest at seven per cent. per annum, payable half yearly. On the 10th of September, 1870, Brittan conveyed the premises to Longley, subject to the mortgage. Holmes assigned the mortgage to the complainants on the 28th of November, 1871. Interest is credited upon it up to September 17th, 1870. The decree was taken for the full amount of the principal, with interest from the last mentioned date, and execution was issued accordingly. That the interest due March 17th, 1872, and on September 17th, of the same year, was paid to the complainants before suit was commenced, is admitted. The decree and execution will therefore be amended by reducing the amount decreed to be due and directed to be raised for the complainants, accordingly. Longley insists that all the interest in dispute was paid to Holmes, and that a note of one Samuel D. Stryker, dated August 8th, 1872, for \$253.10, payable to the order of Brittan & Co. at three months, and by them endorsed to Holmes, who, he insists, agreed to receive it as payment of the interest on the mortgage up to September 17th, 1871, was given in settlement of the whole matter. The evidence of Holmes on the subject is, that he

Citizens Mutual Fire and Marine Insurance Co. v. Brittan.

received from Brittan on the 20th of January, 1871, the memorandum check of Brittan & Co., (Longley was not a member of that firm,) for \$190.00, for the interest due on the 17th of September, 1870, the discrepancy between the amount of the check (\$190) and the amount of the interest (\$192.50,) being accounted for by a small indebtedness due from him to Brittan & Co., which was then allowed. Of this check the whole amount was paid, except \$51.66. He further testifies, that on the 15th of May, 1872, Brittan gave him the note of Samuel D. Stryker, for \$183.20, at five months, payable to the order of Brittan & Co., and by them endorsed, for the interest which was due on the preceding 17th of March, allowing, as in the transaction of the check, some small amount due from him to Brittan & Co.; and that on the 8th of August, 1872, Brittan gave him Stryker's note for \$253.10, at three months, for the interest which was to become due on the 17th of September following, and the amount due on the check above mentioned. Neither of these notes has been paid, and the balance due on the check also remains unpaid. Holmes testifies, that on receiving the check and notes, he gave Brittan receipts for them, by which he agreed that they should be credited on the bond when paid. It is proper to remark, that by agreement between Holmes and the complainants, made on the assignment of the bond and mortgage by the former to the latter, he was to be entitled to the interest on the bond and mortgage up to the 1st of December, 1871, and the company was to hold that interest, when collected, in trust for him. Holmes credited on the bond the interest due on the 17th of September, 1870, but after that date, no interest was credited. The complainants gave receipts for the interest paid to them, that which was due on the 17th of March, 1872, and on the 17th of September following.

The weight of testimony is, that the claim for interest, as made by Mr. Holmes, is just. He is evidently mistaken in the details of the transaction; for when the first note was given, in May, 1872, all the back interest, which he claims is unpaid, had then accrued, and the note given in August,

Citizens Mutual Fire and Marine Insurance Co. v. Brittan.

1872, could not, of course, have been given in anticipation of any part of that interest. But, A. Angelo Brittan, who is the only witness sworn for Longley on this subject, does not swear that all the back interest claimed by Holmes, except that included in the note for \$253.10, was paid, nor does he state what was the consideration of the first note. So, too, of the check. He says it was not given for interest, but he does not state for what it was given. It clearly appears from his testimony, that Longley furnished him with the money to pay all the interest now in dispute. And it also appears, by his own admission, that as to so much of it, at least, as was included in the note for \$253.10, he retained the money and gave to Holmes, Stryker's note, instead of it. The first note was not due when the last was given. It appears to me that it could not have been difficult for Brittan to give the history of the first note and of the check. If he indeed paid all the interest in dispute, except that which is included in the note for \$253.10, there seems to be no good reason why he should not have sworn to the fact. The receipts which Holmes swears he gave on receipt of the check and notes, would have been very important testimony in the case. Angelo Brittan testifies, the note for \$253.10 was given in settlement of all the back interest, and that Holmes agreed to accept it in payment and to credit it on the bond, at once, accordingly. Holmes swears directly to the contrary, and alleges that the receipts he gave for the check and notes, would, if produced, confirm the truth of his statement. It is by no means probable that Holmes would have accepted, as payment of the interest due on the mortgage, the note of a person as to whose pecuniary ability he was not assured, and he testifies that when he took Stryker's notes for the interest, he knew nothing about Stryker. Besides he testifies that, though Brittan requested him to endorse the payment of interest for which the notes were given on the mortgage, he refused to do so, and gave Brittan separate receipts for the money, by which he agreed to endorse the payments, if the notes should be paid. That he gave such receipts is not ab-

Citizens Mutual Fire and Marine Insurance Co. v. Brittan.

solutely denied by Angelo Brittan, in his later testimony. In his earlier testimony, when he was first sworn in this matter, Angelo says that Holmes may have given him receipts, and he may not; that he does not remember whether Holmes gave him receipts for the interest for which the notes were given, or not. He admits that he was at all times in the habit of taking receipts, on paying interest on that mortgage.

The complainants were entitled to be allowed, in respect of interest accrued on the mortgage, between March 17th, 1870, and September 17th, 1871, the amount of the two notes. Although the interest due September 17th, 1870, was credited on the bond, yet the check for it was given and the credit endorsed after Longley became the owner of the property. He cannot, therefore, claim any equity in his favor from the fact of the endorsement.

But the counsel of Longley insists that at all events the latter is entitled to be allowed, as a payment on the mortgage, the sum of \$250 paid by him to Holmes, and for which he gave the latter his note, dated November 20th, 1870. This claim is made under the supplement of April 12th, 1864, to the act against usury, which provides that in all cases of suits at law, or in equity, to enforce any note, bill, bond, mortgage, contract, covenant, conveyance, or assurance, which shall thereafter be made for the payment or delivery of any money, wares, merchandise, goods, or chattels, lent, and on which a higher rate of interest shall be received or taken than that allowed by the law of the place where the contract is to be performed, the amount or value actually lent, without interest or costs of suit, may be recovered, and no more; and if any premium or illegal interest shall have been paid to the lender, the sum or sums so paid, shall be deducted from the amount that may be due as aforesaid, and recovery had for the balance only. It is insisted that the \$250 received by Holmes from Longley, were a premium for the extension of the time for paying the mortgage. But the evidence shows that this money was paid to Holmes, partly as his compensation for inducing the complainants to take

Citizens Mutual Fire and Marine Insurance Co. v. Brittan.

the assignment of the bond and mortgage, and partly as his indemnity against the loss which he would sustain in the sale of the mortgage to them. The mortgage was past due. By an agreement made between Samuel B. Brittan and Holmes, when the mortgage was given, the former was to pay off the mortgage whenever Holmes should be called upon to pay a certain mortgage held by a Mrs. Condit on property which Samuel B. Brittan conveyed to Holmes, subject thereto as part of the consideration of the mortgaged premises, on the conveyance of those premises by Holmes to him. She had required Holmes to pay off that mortgage. He accordingly, then, called on Brittan for payment of the mortgage in this suit. The latter was unable to raise the money, and offered to give Holmes \$250, if he would get some one to take the mortgage and hold it for (according to Holmes' testimony) two years. A. Angelo Brittan testifies (Samuel B. Brittan was not sworn) that "the \$250 were given and accepted as a consideration for Holmes' placing the mortgage where it would not be called for for at least three years." He says: "Holmes said he would have to sustain a loss or sacrifice, giving me to understand that it was some sort of transaction in which he would have to sacrifice some money. In answer to my question, as to how much sacrifice would be involved, he replied, about \$250. I proposed to give him Mr. Longley's note for \$250, payable in three months, drawn to my firm's order, agreeing to endorse the same, and get it discounted, if he desired it; this to be given and accepted as a consideration for his placing the mortgage where it would not be called for for at least three years. Mr. Holmes accepted that proposal, then and there. The note was not then executed. This conversation took place prior to the time the note was given. I wrote to Mr. Longley, and received the note in return, which I endorsed and passed to Mr. Holmes, in pursuance of the agreement just mentioned. the terms of which were reiterated on that occasion." It appears that, under this arrangement, Mr. Holmes, on the 28th of November, 1871, assigned the mortgage to the com-

Mutual Life Insurance Co. v. Southard.

plainants, in consideration of an amount of their capital stock equal to \$5500, at the par value thereof; that he received a dividend of five per cent. on its par value, on this stock, in July, 1872, and that after the next dividend, which was of the like amount, and was declared in January, 1873, had been declared, he sold the stock, including that dividend, at less than its par value. Mr. Holmes did not receive the \$250 in consideration of any extension of time, or of any forbearance. He gave no extension, and exercised no forbearance. He received that money for his compensation in disposing of the mortgage, and for the loss which it was contemplated he would sustain in so doing. It is not premium within the meaning of the statute, and Longley is not entitled to any deduction or allowance on account of it.

Under the circumstances, no costs should be given to either party.

It is understood that, in the submission of this matter on this motion, the complainants tender themselves ready to deliver up the check and notes, all of which are produced before me.

THE MUTUAL LIFE INSURANCE COMPANY vs. SOUTHARD
and others.

A personal decree for deficiency of proceeds of sale has not the force and effect of a judgment at law, until the excess of the mortgage debt over the proceeds of sale has been ascertained. Hence a mortgage given by the party against whom such decree was taken, upon other lands, registered after the decree was made, but before the sale under it, is a lien on those lands prior to the decree.

On motion to amend final decree and execution for sale of mortgaged premises.

Mr. John Whitehead, for the motion.

Mr. A. W. Bell, contra.

Mutual Life Insurance Co. v. Southard.

THE CHANCELLOR.

The bill in this cause was filed to foreclose a mortgage given to the complainants by Samuel R. Southard and wife. The German Savings Bank was made a party defendant, in respect of a mortgage held by that corporation upon the mortgaged premises covered by the complainants' mortgage, given by Edward A. Condit, a subsequent owner of the property, to Harriet A. Condit, and by her assigned to the bank. It was registered on the 29th of August, 1872. Wilberforce Freeman was also made a defendant, because of a certain decree for deficiency in his favor against Edward A. Condit, made on the 6th of August, 1872, in a foreclosure suit in this court, in which the former was complainant, and the latter, with others, was defendant. At the date of that decree, Condit was the owner of the mortgaged premises in this suit. The decree appears to have been docketed in the office of the clerk of the Supreme Court, on the 10th of January, 1873. The question now before me is between the bank and Freeman, in regard to the lien of that decree. The latter insists that it became a lien on the mortgaged premises in this cause, at its date. The bank, on the other hand, insists that it did not become a lien until after the sale of the mortgaged premises in the suit in which the decree was made, which was subsequent to the registry of their mortgage. The final decree in this suit recognizes the priority of Freeman's decree for deficiency over the mortgage of the bank, and the question is submitted with a view to the amendment of the decree and execution, if the court shall be of opinion that Freeman is not entitled to such priority. By the ninety-second section of the chancery act, (*Nix. Dig.* 118,) it is enacted that all decrees and orders of this court, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation, and effect of a judgment at law in the Supreme Court, from the time of the actual entry of such judgment, and that the Chancellor may order such executions thereon as in other cases. By the supplement to that act, approved March 29th, 1866, (*Nix. Dig.* 119, § 104,) it is

Mutual Life Insurance Co. v. Southard.

enacted, that it shall be lawful for the Chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of the mortgage debt above the net proceeds of the sales, by any of the parties to such suit, who may be liable, either at law or in equity, for the payment of the same. The decree for deficiency, in *Freeman v. Condit*, was in these words: "And that, if the proceeds of such sale shall not be sufficient to pay the amount due the complainant, together with interest and costs, the defendant, Edward A. Condit, shall pay the deficiency." It will be seen that the decree was not for the payment of any sum of money, but for the payment of a deficiency, in case one should be found to exist. The practice of this court, under such decrees, is to follow the decree by an order after sale, reciting the proceedings under the execution, and the existence and amount of the deficiency as ascertained by the statement of the officer by whom the writs were executed, and an award of execution, to make the amount with interest, and the costs of the order and the last mentioned writ. The personal decree in this case was, in fact, an inchoate decree, merely. Until the excess, if any, of the mortgage debt over the net proceeds of sale had been ascertained, it could not have the force, effect, or operation of a judgment at law. The power which the statute confers is, to make a personal decree for the excess. The decree, in this case, followed the statute. This subject was considered in *Bell v. Gilmore*,* decided at the last May Term of this court. The mortgage of the bank is entitled to priority over the decree for deficiency. The decree and execution in this case will be amended accordingly.

* Ante p. 104.

Miller v. Wright.

MILLER and others vs. WRIGHT and others.

Decree *pro confesso* opened, with leave to answer, on the ground of surprise ; no negligence being attributable to the defendants.

On motion to open decree *pro confesso* and let in defendants, Charles E. Miller and wife, to answer.

Mr. E. A. S. Man, for the motion.

Mr. L. Zabriskie, contra.

THE CHANCELLOR.

The bill is filed by a trustee, for partition between himself and one of the *cestuis que trust*, of the trust property, in which the former claims a beneficial interest of two-third parts, and for an allowance out of the estate of certain expenditures which he claims to have made as trustee, for the benefit of the estate. Charles E. Miller and his wife, are made defendants to the suit, in respect of the interest which they had in the trust property when the complainant became trustee, and which the complainant alleges Charles E. Miller and his wife afterwards conveyed to him for the consideration of \$1000, by him paid to the former therefor. The complainant, when he assumed the trust, was interested in the trust estate equally with each of the defendants, Eliza Ann Wright, who is his sister, and Charles E. Miller, who is his brother. The bill was filed on the 21st of July, 1871. An order of publication as against Charles E. Miller and his wife, who were non-resident defendants, was made on the 10th of August, following, requiring them to appear, plead, answer, or demur to the bill, on or before the 11th of October, then next. Notice of this order appears to have been duly mailed to them, and to have come to their hands in August. They did

Miller v. Wright.

not appear, and a decree *pro confesso* was entered against them, but not, however, until February, 1873. By that decree the complainant was directed to proceed *ex parte* as against them, and to produce evidence to substantiate his allegations in the bill against them, accordingly. The other defendant, Eliza Ann Wright, filed her answer on the 5th of December, 1871, and a replication thereto was filed on the 12th of January, following. Since the entry of the decree *pro confesso* there appears to have been no step taken in the cause. The present application is based on the ground of surprise, and the sworn allegation that Charles E. Miller and his wife have a just and valid defence to make in the action. It appears from their affidavits, that in August, 1871, they placed the notices they had received in the hands of an attorney-at-law of Brooklyn, New York, where they resided, with instructions to him to attend to their interests in the suit in their behalf; that he informed them that he would be unable to appear as solicitor, in this state, but undertook to employ a solicitor for them in the premises, here. They seem to have relied on his attending to the matter, and notifying them when their personal attention to it would be necessary. In their statement on this score they are corroborated by the attorney, whose affidavit was read on this motion. He alleges that after receiving the notice, he called on the complainant's solicitor and informed him that Charles E. Miller and his wife had a good and valid defence to the action, and were determined to contest the suit, and requested him to give him the name of some solicitor of this state, to whom he might commit the charge of their interests in the litigation, and on whom he might rely for their defence in the suit; that the complainant's solicitor, accordingly, gave him the names of three solicitors; that he repeatedly went to the offices of two of them, but was unable to find them, and that subsequently he obtained an interview with one of the two, who declined to take charge of the matter. He says, he then called on the third, and left the papers with him, and requested him to take charge of the business, and offered to pay him a retaining

Miller v. Wright.

fee. He adds, that the gentleman last named still retains the papers. He further says, that he repeatedly called at the office of the complainant's solicitor for an extension of time to answer, and was always told that it would be granted. The only affidavit presented in opposition to these affidavits, is that of the complainant. He swears that, since the commencement of the suit, he has had frequent interviews with Charles E. Miller, some of which were in the presence of the wife of the latter, and in those interviews Charles E. Miller said, referring to the conveyance above mentioned, made by him and his wife to the complainant, of his interest in the trust property, that inasmuch as he had no interest in the subject of the controversy, it was useless for him to go to the expense of filing an answer.

In view of the fact that the complainant claims in this suit to be the owner of the share of Charles E. Miller in the trust property, by a purchase made by him after he became trustee, and while he was clothed with the trust, in respect of which transaction Charles E. Miller and his wife were made parties to this action ; that Charles E. Miller and his wife appear to have contemplated making a defence to the suit from the beginning, and to have made, what seemed to them, proper provision to that end, and to have presumed, until about the time of the entry of the decree *pro confesso*, that whatever was requisite for the purpose had been done ; that an extension of the time to answer was repeatedly given out of court, and without order or written or other stipulation by the solicitor of the complainant, on the application of their attorney, with no notification or intimation, as far as appears, at any time, of an intention to enter a decree by default, in case of failure to file an answer within the additional period accorded, and that, since the entering of the decree, no step has been taken in the cause ; it seems proper to vacate the decree *pro confesso*, and let in Charles E. Miller and his wife to answer.

This will be done, on terms that they pay the costs of the decree and of this application, and file their answer in thirty days.

Frazier's Administrators v. Beatty.

FRAZIER'S ADMINISTRATORS vs. BEATTY and others.

Application for order for possession by purchaser of mortgaged premises at sheriff's sale; order accordingly.

On motion for order for possession.

Mr. J. R. English, for the motion.

Mr. Cortlandt Parker, contra.

THE CHANCELLOR.

The petitioner, Robert W. De Forest, purchased the mortgaged premises at sheriff's sale, under the execution issued in this cause. The sale appears to have been fair. No complaint is made of the action of the sheriff. Nor does there appear to be ground for any. The property was struck off to Samuel S. Moore, the agent of the petitioner, at the price of \$16,200. The petitioner paid the money, and received a deed from the sheriff, accordingly. The respondents have answered the petition. In their answer, they allege that one Jacob Davis, prior to the sale, undertook to obtain a loan on the property for them, to enable them to save it from sale, and they charge bad faith and duplicity, on his part, in the matter. The answer alleges, also, that the respondents believe that they were defrauded out of the property by the conspiracy of Davis and the person from whom he was to obtain the loan, and Moore and other persons. The statements of the answer are verified only by the oaths of the respondents, and no other testimony is offered by them, except the affidavits of two persons, who swear that the property was worth, on the day when it was sold, at least \$45,000. The affidavits put in on behalf of the petitioner overthrow the charges and statements of the answer in regard to the alleged fraud and conspiracy. On a full and careful examination of the case, I am unable to

Frazier's Administrators v. Beatty.

find any evidence of either fraud or conspiracy. Davis appears to have been acting merely as a friend to the respondents in the effort to obtain the desired loan, and his endeavors seem to have been unsuccessful, because the respondents required much more money for their purpose than they had led him to suppose. He swears that he never had any conversation with Moore or with Kean, (who directed Moore to purchase the property at the sheriff's sale for De Forest,) or with De Forest, in relation to the property or the loan or the suit, before the sale; and never had any suspicion, whatever, that any one was expecting to buy the land; and he further swears that he does not know De Forest at all. Moore swears that he first learned that the land was to be sold, by hearing the sale adjourned by the sheriff at the latter's office; that he then told Kean that the property was advertised to be sold, and that on the day it was sold, Kean, in whose employment he is, instructed him to attend the sale and bid the land up to a certain sum, Kean saying that he wanted the property, if it could be purchased at a certain price, for a man in the city of New York; that he purchased the property for \$16,200, there being several bidders besides himself; that he afterwards paid to the city of Elizabeth \$2272.03 for unpaid taxes and assessments on the property, and that, by Kean's direction, he caused the deed to be made to De Forest. He swears that he, at no time, conspired with any one to defraud the respondents, and that he never spoke to any one in relation to the matter, except Kean and Kean's counsel, and one of the complainants, of whom he asked, the day before the sale, whether the sale would certainly take place on the next day, and whether any portion of the purchase money could remain on bond and mortgage, and was told in reply, that the sale would certainly take place on the next day, and that the purchase money must be paid. He denies, explicitly, the statements made by the respondents in their answer, as to conversations with him, and swears that he never, before the sale, exchanged a word with Davis, or with any one with whom the respondents were negotiating for a loan, in relation to the

Morris v. Mayor and Council of Bayonne.

land or the sale. He also swears that the land, at the very highest, is not worth, at a cash sale, more than \$25,000 or \$26,000. Kean, in his affidavit, affirms the truth of Moore's statements as to the employment by him of the latter, and the instructions the latter received from him. The person to whom Davis applied for the loan also swears to the circumstances of that transaction, and denies all conspiracy against the respondents, and swears that he had no suspicion that any one intended to buy the land. Two witnesses, William McKinley and Thomas B. Leggett, testify, on the part of the petitioner, as to the value of the land. The former is an owner of real estate in the same ward in which the land is situated. He swears that he is acquainted with the property, and that, at a cash sale, it is not worth more than \$25,000, at the utmost. The latter testifies that he is acquainted with the value of real estate in Elizabeth, and has bought and sold land in the ward in which the premises in question are situated, to the amount of \$200,000; that he is acquainted with the property, and that he thinks that, at a cash sale, it is not worth more than \$15,000.

The petitioner was a fair purchaser, at a fair sale. He has spent, in the purchase money and taxes and assessments, over \$18,000. I see nothing to justify me in withholding from him the desired order for possession.

MORRIS vs. THE MAYOR AND COUNCIL OF THE CITY OF BAYONNE and another.

1. Under a provision of a city charter, that "where streets are ordered to be opened, graded, or paved, or where side or crosswalks are ordered to be made, the owners of property on the line thereof may open, grade, and pave, or lay side or crosswalks at their own expense, but in the manner directed by the board of councilmen, provided they do the same within a reasonable time, to be fixed by said board, otherwise said improvement shall be done by the city, in the manner provided by this act." *Held—*

Morris v. Mayor and Council of Bayonne.

1. That permission given to property owners to grade a street, for opening, regulating, and grading which an ordinance was passed upon their application, did not take away from the council their power over the matter of regulating and grading the street.

2. That the property owners having graded only a part of the street, leaving the rest of it ungraded, and having ceased to do any work on it, the council would not be restrained from completing the work.

2. A party has no standing to invoke the aid of the court against the execution of a public improvement by the municipal authorities, because he will thereby be made liable to be assessed for such improvement, if he insists, the authorities have no power to make the improvement.

On order to show cause why an injunction should not issue. On bill and answer, and affidavits annexed thereto, respectively.

Mr. S. C. Mount, for complainant.

Mr. A. T. McGill, for defendants.

THE CHANCELLOR.

The bill prays an injunction to restrain the defendants, the mayor and council of the city of Bayonne, from prosecuting the work of grading 43d street, in that city, from Avenue E to New York bay, under a contract made with them for the work by the defendant, Daniel Peck. It appears, from the bill and answer, and the affidavits thereto respectively annexed, that, in 1871, the board of councilmen, on the petition of property owners, duly passed an ordinance to open and regulate and grade the street in question, from Avenue E to New York bay; that, after the passage of the ordinance, the property owners on the line of that portion of the street which was to be graded, applied to the council for leave to do the work themselves. The desired permission was accorded, the council directing that the work be completed by the 1st of December, 1871. The council proceeded to appoint commissioners to open the street, and the latter performed all the service required of them in that behalf. Whether they were discharged, or not, is a point as to which the complainant and

Morris v. Mayor and Council of Bayonne.

the defendants differ. The property owners graded the street from Avenue C to Avenue E, but no further, leaving ungraded so much of it as lies between Avenue E and New York bay. They having ceased to work on the street in the fall of 1873, the council, in July or August, 1874, advertised for proposals for completing the work, and awarded the contract to the defendant, Peck, with whom they entered into an agreement accordingly. The complainant insists, substantially, that the power of the council over the matter of regulating and grading the street under the ordinance, was at an end when they gave the property owners permission to do the grading themselves. But the proviso of the sixty-eighth section of the act of 1869, the original act of incorporation, is fatal to this claim. That section is as follows: "In all cases where streets or avenues are ordered to be opened, graded, or paved, or where side or crosswalks are ordered to be made, the owners of property on the line thereof may open and grade and pave, or lay side or crosswalks, at their own expense, but in the manner directed by the board of councilmen, provided they do the same within a reasonable time, to be fixed by said board, otherwise said improvement shall be done by the city, in the manner provided by this act." The complainant, with the other land owners, in August, 1874, after the appearance of the advertisement soliciting proposals for the work, remonstrated, in writing, against the performance of the work by the city. Their remonstrance was presented at the meeting of the council, at which the bids for the work were received. The complainant insists that, under the sixty-eighth section of the supplement of 1873, to the revised charter of the city, (*Pamph. L.*, 1873, p. 468,) this remonstrance, being signed by the owners of more than half of the property, according to lineal feet, to be assessed for the improvement, should have been effectual to prevent the council from proceeding with the work. The section just referred to contains this proviso: "Provided, the said board of councilmen shall not proceed to make any improvement, if the owners of more than one-half of the property per lineal feet

Morris v. Mayor and Council of Bayonne.

front to be assessed for the improvement, shall remonstrate against the same being made." That provision, however, appears to have reference solely to the improvement which is the subject of the section—the opening of streets.

But the complainant further objects, that the contract binds the contractor to repair, without charge or compensation therefor, the sidewalks and carriage way of so much of the street as has already been graded by the property owners. This, he argues, has undoubtedly tended to increase the rates charged for the work, for which compensation is to be received under the contract, while by the charter the property owner, in front of whose land the sidewalk is, is bound to pay for repairing it, and repairs to the carriage way are to be paid for out of the money raised by tax for repairs of streets. The answer, however, denies that the contract contains any such provision, and it sets out a clause which it says is all that is contained in the contract, on that score. It is merely a requirement that the contractor shall, without extra charge, regulate the street to its full width, removing all surplus earth, stones, &c., in that part of the street which has been graded by the property owners. The ordinance of 1871 provides for the opening, and regulating, and grading the street. By the charter it might lawfully include all these different improvements. The applicants requested the council to dispense with a preliminary map and report of commissioners in respect to these improvements, and, as under the charter they might, the council granted the request, and proceeded to execute the street opening, accordingly. As to the rest, the regulating and grading, the property owners asked to be permitted to do that themselves. To this the council assented, limiting the time within which the work was to be completed. After giving to the property owners more than two years further time, and still finding the work unfinished, they proceeded under the ordinance, to complete the work themselves. No valid reason appears to me for preventing them from so doing. But if it be conceded that the council are proceeding illegally, and that, as the com-

 Bedle v. Wardell.

complainant insists, they have no power to do the work under the ordinance, and are therefore proceeding without authority of law, the complainant is not entitled to the relief he seeks. He files his bill in behalf of himself and other property owners who may be liable to be assessed for the improvement. No lawful assessment can be imposed upon the property owners if the proceedings complained of are justly liable to the objections he makes. He has therefore no occasion to invoke the aid of this court against the city to prevent the execution of the contract. Of the necessity for the improvement the legislature have made the council the judges. The work and the contract are within the scope of the powers of the council. There is no evidence of any fraud in the contract. The order to show cause will be discharged, and the bill dismissed, with costs.

BEDLE vs. WARDELL and wife.

In a suit to foreclose a usurious mortgage, the mortgagor is not entitled to a deduction of all the interest paid on the whole principal sum of the mortgage, but only of the interest on the excess of such principal sum over the amount actually loaned.

On final hearing on bill, answer, and proofs.

Mr. Beekman and *Mr. Murphy*, for complainant.

Mr. R. Allen, Jr., for defendant, S. Wardell.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage made by the defendants, Samuel Wardell and wife, in favor of the complainant, on certain land in Monmouth county, for \$1000, payable in one year from its date, (August 2d, 1871,) with

Bedle v. Wardell.

lawful interest. The interest on the mortgage was paid up to the 2d of August, 1873. The suit was commenced on the 1st of July, 1874. The mortgagor alleges in his answer, that in pursuance of an agreement made between him and the mortgagee, on the loan of the money, he allowed to the latter \$100, as premium for the loan, and accordingly received only \$900 for the mortgage. The receipt of this premium under that agreement, is admitted by the complainant in his testimony. The mortgagor insists that the complainant is entitled to a decree for only \$760, the amount of the money actually lent, less the interest paid on the mortgage. The supplement of April 12th, 1864, to the act against usury, declares that in all cases of suits at law or in equity to enforce any note, bill, bond, mortgage, contract, covenant, conveyance, or assurance, which shall be thereafter made for the payment or delivery of any money, wares, merchandise, goods, or chattels lent, and on which a higher rate of interest shall be reserved than was or is allowed by the law of the place where the contract is made, or is to be performed, the amount or value actually lent, without interest or costs of suit, may be recovered, and no more; and if any premium or illegal interest shall have been paid to the lender, the sum or sums so paid shall be deducted from the amount that may be due as aforesaid, and recovery had for the balance only. The complainant then can only recover, in this suit, the amount actually lent, which is \$900, less the illegal interest which he has received, which is \$7. The act does not direct a deduction of all interest which has been received on the loan, but all illegal interest only. The complainant has received interest for one year on \$1000, whereas, he lent only \$900. He has therefore received, illegally, interest for one year, \$7, on \$100. Deducting the premium and illegal interest from the amount of the mortgage, there remains due to the complainant the sum of \$893, for which, without interest or costs, he is entitled to a decree.

Garthwaite's Executor v. Lewis.

GARTHWAITE'S EXECUTOR vs. LEWIS and others.

1. Where testator gives the net income of a share of the residue of his estate to a son, absolutely, but not the principal, disposing of the latter, in case the son die without having received it, leaving issue, and making the payment of the principal to the son entirely discretionary with the executor, such share does not vest in the son so as to be transmissible in case of the decease of the son without having received it.
2. Such share, in case of the son's death without issue, does not fall into the residue, but is undisposed of. Though the rule is that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue itself, which fails.

Bill for relief.

Mr. W. S. Whitehead, for complainant.

THE CHANCELLOR.

William Garthwaite, late of Newark, deceased, by his will and the codicil thereto, gave to his executors and the survivors and survivor of them, certain shares of the residue of his estate, in trust, to hold the same, as to four of them, for four of his sons therein named, one share to each, during their several and respective lives, and after deducting costs, charges, taxes, repairs, commissions, expenses, and insurance, to pay over to those sons, quarterly, in equal shares, the net income thereof. And he thereby authorized his executors and the survivors and survivor of them, at any time he or they should deem it wise, prudent, and expedient to do so, to pay over to "either of" his said four sons "the equal principal share of said trust fund to which he may be entitled." The testator further ordered that in case any of his said four sons "should die leaving issue, without receiving their equal principal share of said trust fund," his executors or the survivors or survivor of them should pay over such principal

Garthwaite's Executor v. Lewis.

share to such issue, or to his, her, or their legally appointed guardian or guardians, in equal shares. But should any of his said four sons die without leaving issue, and without receiving his "equal principal share" of the residue, but leaving a widow, he authorized his executors and the survivors and survivor of them, at their or his discretion, to pay over to such widow the interest of such principal share, during her widowhood, but no longer. He made no further disposition of those shares.

The question is submitted, whether these shares are vested in the sons so as to be transmissible in case of the decease of the sons without having received them. The testator gives the net income of the shares to the sons, absolutely, but not the principal. He disposes of the latter in case the sons die without having received it, leaving issue. The fact that he makes the payment of the principal to the sons entirely discretionary with the executors, forbids a construction which would hold the shares to be vested in the sons. *Lewis v. Lewis*, 1 Cox 162; *Robinson v. Cleator*, 15 Ves. 526; *Gompertz v. Gompertz*, 2 Phil. 107; *Scawin v. Watson*, 11 Jur. 293; S. C. affirmed, *Id.* 576. The gift of the principal is not an absolute gift modified by subsequent restrictions, so that the absolute gift would have its full effect so far as the restrictions were not applicable; but it is a restricted and limited gift—a gift to the sons of the net income for life, and of the principal, provided, and only provided, the executors or the survivors or survivor of them deem it "wise, prudent, and expedient" to pay it to them. The fact that the testator directed, that in case any of the sons should die without leaving issue, and leaving a widow, the net income of his share should, at the discretion of the executors or the survivors or survivor of them, be paid to her during her widowhood, is evidence that he did not intend to give the principal of the shares absolutely to the sons, and consequently, that the principal, if not paid to them, should not vest in them.

The further question is raised in this case, whether, if these shares be not vested in the sons, the principal, in case

Fulton v. Golden.

of the death of any of them without issue, falls into the residue of the estate. These shares are shares of the residue itself, and though the rule is that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue itself, which fails. *Hawkins on Wills*, 40, 42; *Bagwell v. Dry*, 1 P. W. 700; *Page v. Page*, 2 P. W. 489; *Skrymsher v. Northcote*, 1 Swanst. 570; *Humble v. Shore*, 7 Hare 247. The principal of these shares is still undisposed of in case of the death of any of the sons without issue.

FULTON vs. GOLDEN.

The pendency of an action at law by A against B, in a court of another state, constitutes no bar to a suit in equity here by B against A for the same object.

Bill for account. Plea. •

Mr. J. Alexander Fulton, pro se.

Mr. E. T. Green, for defendant.

THE CHANCELLOR.

To the complainant's bill for an account, the defendant pleads the pendency of an action of account between himself and the complainant in the Court of Common Pleas, in and for the county of Armstrong, in the state of Pennsylvania. It appears by the plea, that that suit was instituted by Golden against Fulton. The pendency of a suit at law, if brought by Fulton against Golden for the identical object and purpose with which this suit is instituted, would constitute no bar to this action. *Way v. Bragaw*, 1 C. E. Green 213. Nor would the fact that such suit is pending in a court of

 Miller's Administrator v. Miller.

another state make any difference. *Bowne v. Joy*, 9 Johns. 221 ; *Walsh v. Durkin*, 12 Johns. 99 ; *Newell v. Newton*, 10 Pick. 470 ; *Howard v. W. & S. R. R. Co.*, 2 Harrington 471. The plea in this case, however, does not aver the pendency of any other suit by the complainant against the defendant, but of a suit by the latter against the former.

The plea will be overruled, with costs, and the defendant will be ordered to answer in thirty days.

 MILLER'S ADMINISTRATOR vs. MILLER and others.

1. An administrator is entitled to enforce specific performance of a contract made with his intestate for the purchase of real estate.

2. Want of capacity, as a defence to the enforcement of the contract, should be distinctly set up in the answer.

3. A contract for the sale of real estate works an equitable conversion of the land into personalty from the time when it was made, and the purchase money becomes, thereupon, a part of the vendor's personal estate, and, as such, distributable, upon his death, to his widow and next of kin.

4. In equity, on the execution of a contract for the sale of real estate, the vendor becomes trustee of the property for the purchaser, and upon his death intestate, his heir-at-law becomes such trustee in his stead. Judgments against the heir-at-law are not liens upon the property.

5. To a bill by an administrator to compel specific performance of a contract made with his intestate, for the purchase of real estate, it was objected that the administrator was not properly before the court to entitle him to a decree ; that there were judgments against the heir-at-law ; that the intestate's widow would not release her dower ; that the contract provided for opening roads through the property ; and that the administrator was in laches in filing the bill. *Held*—

1. The judgments against the heir were not liens upon the property.

2. The widow did not appear to have been requested to release her dower, but appeared to have been willing to do so, provided the purchase money were paid to the administrator ; and the administrator, by the bill, tendered a release of the dower, on the purchaser's performance of agreement.

3. The heir-at-law could have opened the roads provided for in the contract.

4. The lapse of two and a-half months after taking out letters of administration, which was on the day when the deed was to be delivered, before filing the bill, does not deprive complainant of the right to bring this suit.

Miller's Administrator v. Miller.

6. When a contract which should be enforced contains inequitable provisions, equity will decree performance of it, only upon such terms and with such restrictions, as to secure equity in the premises.

7. Time, in this case, is not of the essence of the contract.

8. Specific directions by the court, as to the carrying out of the agreement; the terms of the mortgage to be given for the purchase money; and the disposition of the purchase money and securities.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. Vanatta, for complainant.

Mr. Pitney, for David L. Miller.

Mr. F. G. Burnham, for Hoyt, Reddish, and Ohlen.

THE CHANCELLOR.

On the 10th of June, 1872, John B. Miller, now deceased, being the owner in fee of a tract of land of forty-nine acres and twenty-four hundredths of an acre, situated in the township of Chatham, in the county of Morris, in this state, entered into an agreement with Jehiel K. Hoyt for the sale of those premises to the latter, for the price of \$39,392. The agreement was in writing, and was signed by both parties. By it, Miller, for the consideration of that sum, agreed with Hoyt that he would well and sufficiently convey the land to Hoyt, his heirs and assigns, or to such person or persons as Hoyt might designate, on or before the first day of September then next, by a full covenant warranty deed, free and clear from all encumbrances, and that he would open a new road, sixty feet in width, on or before the 2d day of the last mentioned month, from the upper Madison road to a new road then lately laid out through the property. On his part, Hoyt covenanted with Miller to pay, or cause to be paid to the latter, his heirs or assigns, the consideration money as follows: \$100 on the execution of the agreement; and, on the day of the execution and delivery of the deed of conveyance, the

Miller's Administrator v. Miller.

further sum of \$4900 ; and that, on the last named day, he, or the person or persons to whom the deed of conveyance should be delivered, should execute and deliver to Miller his or their bond and mortgage upon the premises, to secure the sum of \$34,392, the residue of the purchase money, which sum, secured by the bond and mortgage, should be payable at the termination of seven years from the date of the bond and mortgage, the interest to be payable annually, and to begin to run six months after the date of the delivery of the deed of conveyance. It was also thereby agreed that the bond should contain the usual sixty days interest clause, and that the mortgage should contain an agreement whereby Miller, his executors, administrators, or assigns should release to Hoyt, his heirs, executors, administrators or assigns, any portion of the premises, on the payment to Miller of such sum as should be equivalent to the rate of \$800 per acre for such part to be released, and that such sum so paid should thereupon be endorsed on the bond as a payment on account thereof. On or about the 20th of August, 1872, it was agreed between Miller and Hoyt, that the time for the delivery of the deed should be extended to the first day of October then following. Before the last mentioned day, Miller died. The deed had not yet been delivered. Miller died intestate, leaving a widow and one child, the defendant, David L. Miller, his sole heir-at-law. John B. Miller, on the 25th of April, 1872, had made an agreement, in writing, with Hoyt, by which, for the consideration of one dollar, he agreed to sell the premises in question to Hoyt, or to such company of individuals as might be named by him, on his or their paying to Miller the further sum of \$100, and agreeing to buy the property ; notice of intention to close the sale to be given to him before the 1st of June then next. The general terms of the sale were to be, \$800 per acre, of which \$5000 were to be paid in cash, and the residue to be secured by bond and mortgage on the property, payable in five years ; interest to commence six months from the execution of the bond and mortgage. Miller thereby agreed that, on fulfillment of the

Miller's Administrator v. Miller.

oper stipulations, he would give a good and valid warranty deed for the property. He also agreed to open a road between the house then occupied by David Miller and his, John B. Miller's, barn, extending to the land in question, and not less than three rods wide. This was the preliminary agreement between Miller and Hoyt. On the 28th of May, 1872, Hoyt entered into an agreement with Henry E. Reddish, Henry C. Ohlen, and Charles T. B. Keep, by which, among other things, he and they assumed the last mentioned agreement between Miller and Hoyt, and it was agreed that it should enure to their benefit, and its covenants and liabilities performed by them, as far as they were to be performed by Hoyt; and also, that when the title to the land should be required thereunder, such title should be vested in Reddish and Ohlen, as joint tenants, and not as tenants in common, and that they should hold the same for the purposes named in the agreement between them and Hoyt and Keep. On or about the 23d of September, 1872, after the death of John B. Miller, Hoyt wrote to David L. Miller, declaring his readiness to fulfill the contract of June 10th, 1872, between Hoyt and John B. Miller, and notifying David L. Miller, as sole heir-at-law of the latter, that he looked to him for the fulfillment of that contract on his part, and that on the first day of October then next, he would request him, and he thereby then requested him to deliver, on the last mentioned day, a deed for the premises, according to the contract. By the letter, he designated Reddish and Ohlen as the persons to whom the conveyance should be made. On the 1st of October, 1872, Reddish and Ohlen made a tender to David L. Miller of the money which, by the contract of June 10th, 1872, for the sale of the land, was to be paid on the delivery of the deed, and they tendered also the bond and mortgage which were to be delivered for the residue of the purchase money. David L. Miller then offered to convey the property to them on the receipt of the money and the bond and mortgage, and tendered a warranty deed for the property, with the usual full covenants, executed by himself and wife, and duly

Miller's Administrator v. Miller.

acknowledged. They, however, refused to receive the deed, and pay the money and deliver the bond and mortgage, unless Miller would deliver to them, at the same time, a duly executed release of the dower of the widow of John B. Miller, and would cause to be canceled of record certain judgments of large amount in the aggregate, which were of record against him. So far as the judgments were concerned, he offered to indemnify them out of the money which was to be paid by them, which was sufficient for the purpose. They refused, however, notwithstanding his offer, to accept the deed and pay the money and deliver the bond and mortgage, because of the want of the release above mentioned.

On the 1st of October, 1872, letters of administration of the goods, chattels, and credits of John B. Miller, deceased, were issued to the complainant by the surrogate of Morris county, and on the 20th of December following, the complainant filed his bill in this court against David L. Miller and his wife, Hoyt, Reddish, Ohlen, and Keep, and the widow of John B. Miller, deceased, and the judgment creditors of David L. Miller, praying that the agreement of June 10th, 1872, between his intestate and Hoyt, may be specifically performed, and particularly that it may be decreed that David L. Miller is seized of the legal title to the land as trustee of and for Hoyt or his appointees, and is bound to and do convey the legal title to the land, with the appurtenances, to Hoyt or his appointees, upon his or their paying and securing the purchase money to the complainant, as administrator, pursuant to the agreement, and that the land may be conveyed, free and clear of all encumbrances, real or apparent, made, caused, or suffered, by David L. Miller; and that it may be decreed that the wife of David L. Miller is not entitled to any dower, or right of dower, inchoate or otherwise, in the land, and that the land be conveyed by David L. Miller, and held by the purchaser or purchasers forever thereafter, free and clear of any dower, or right of dower, inchoate or otherwise, of the wife of David L. Miller; and that Hoyt, Reddish, Ohlen, and Keep may be decreed and required to perform that agreement in all

Miller's Administrator v. Miller.

things thereby, by the purchaser or purchasers, to be performed, and particularly that they, or some of them, may be required to pay and secure to the complainant, as administrator, the purchase money mentioned in the agreement, according to the terms of the agreement, on the complainant's delivering, or procuring to be delivered to them, a release of the dower of the widow of John B. Miller in the land; and also that the rights of the widow in and to the purchase money may be ascertained, and the time and manner of paying to her what may be due to her in that respect, may be ordered and decreed; and that the judgments against David L. Miller and every of them, may be declared and decreed to be no liens or lien on the land, and that the land be conveyed by David L. Miller to the purchaser or purchasers, free and clear of the judgments, and of every of them, and that the purchase money may be decreed to be personal assets of the estate of John B. Miller, deceased, and, as such, payable to, and receivable by, the complainant, as administrator.

After the filing of the bill the widow died, and administration of her estate was, on the 29th day of January, 1873, granted to Keep and his wife, the latter being her daughter by a former husband. On the 13th of December, 1872, before the filing of the bill, the widow, by a letter addressed by her to the complainant as administrator, referring to the agreement of June 10th, 1872, stated that she had expected to join with her husband in the conveyance of the land so as to release to the purchaser her right of dower therein, and that she was still ready to do what and all she could to perform that agreement, and was ready to deliver to any person or persons who might become the purchaser or purchasers of the land, under and pursuant to the agreement, a release duly executed, of her dower and right of dower in and to the land, provided the purchase money be paid and secured, (so far as time was given on any part of it for payment,) to the complainant, as administrator of John B. Miller, deceased. She further thereby declares her willingness to take for her interest in the land, or for her share of the purchase money,

Miller's Administrator v. Miller.

such share or portion thereof as the courts in this state should adjudge to be her right. And in consideration of the premises she thereby offered to and agreed with the complainant, that if he would, by judicial proceedings or otherwise, cause or procure the agreement to be specifically performed, and the purchase money to be paid and secured to be paid to him as administrator, she would, whenever the purchase money should be so paid and secured, at his request, deliver to the purchaser or purchasers receiving the conveyance, a full release of her dower and right of dower in the land; she declaring herself willing to receive from the complainant, as administrator, such portion of the purchase money as should be adjudged to belong to her. She added that she was not willing, and did not consent, that the purchase money should be received by or for David L. Miller, as heir of John B. Miller, deceased, or otherwise.

David L. Miller, Keep and his wife, as administrators, and Hoyt, Reddish, and Ohlen answered the bill. Miller, by his answer, admits that the land descended to him as sole heir-at-law of his father, subject to the dower of the widow therein, and that she was entitled to a distributive share of the personal estate of his father. He states that he declared himself ready to convey the premises in question according to the agreement of June 10th, 1872, provided he were satisfied of the existence and validity of that agreement, and that he tendered a deed for the property to the attorney of Reddish and Ohlen, on the 1st of October, 1872, and that it was refused only on the ground that the widow's dower had not been released. He alleges that the personal estate of his father was ample for the payment of all his debts, and he denies that under the circumstances, the complainant, as administrator, is entitled to receive the purchase money of the land, on sale thereof under the agreement, and he claims that the land is his individual property, by descent from his father, and is not subject to any trust. He alleges that the agreement was obtained from his father by Keep, through Hoyt, in the interest of his mother-in-law,

Miller's Administrator v. Miller.

the widow, in order by that means to convert the property into personalty, with a view to her obtaining a distributive share thereof, accordingly, as personal property, on the death of his father, who was then very old and infirm; that Keep obtained the extension of the time for carrying out the contract to the 1st of October, 1872, and that on that day there was, in fact, no one ready to take the property under the agreement, but that the tender was a mere pretence. He alleges besides, that Keep arranged with Hoyt that the widow should absent herself on the 1st of October, so that she might not be in the way of executing a release of her dower and that so the tender might be made with safety, and that she did so absent herself on that day, accordingly; and he alleges that by such conduct she forfeited, abandoned or waived all right, if she ever had any, to have the land decreed to be personalty, or to any part of the proceeds of the sale of the property, if the contract should be established and specifically performed. He further alleges that the proceedings in this suit are really carried on in the interest of the personal representatives of the widow, and that they were in fact instituted by her, or in her behalf. The answer alleges laches on the part of the complainant and the widow in filing the bill for specific performance, and alleges that if John B. Miller entered into the contract in question, and did indeed extend the time for the performance of it, he was induced to do so at a time when his mind was in an enfeebled condition, against his own better judgment and will, by the over persuasion and undue influence, fraud, and contrivance of his wife and Keep, and without understanding that the result of the contract might be to increase the share which his wife would have in his estate at his death.

Hoyt, Reddish, and Ohlen, by their answer, admit the agreement of June 10th, 1872, and their liability to take the property thereunder, and allege that they were ready to do so on the first of October, 1872, and that their tender was bona fide. They allege that the widow, in order to hinder and delay them, and to prevent the fulfillment of the terms

Miller's Administrator v. Miller.

of the contract, designedly, on the 1st of October, 1872, departed from her residence in the village of Madison, contiguous to the dwelling-house of David L. Miller, and immediately left this state, and continued to absent herself from her residence and from this state for a long time thereafter, and thereupon neglected and refused to release her dower in the property; and they charge and insist that she, by her conduct in this respect, caused them great vexation and put them to large pecuniary charges and loss. The answer further alleges that the time for the fulfillment of the contract was an exceedingly important element therein, and that by reason of the non-performance of the agreement by David L. Miller and the widow, Hoyt, Reddish, and Olden have been put to heavy expense and great loss and damage; that, relying on the agreement, and supposing that it would be carried into effect by John B. Miller, or his representatives, they spent large sums of money in laying a public road and opening the same up to the premises, and they hoped by such expenditures and improvements to immediately sell a considerable portion of the land to be conveyed to them by John B. Miller or his representatives, under the agreement, and thus reap a large pecuniary profit therefrom, but that the conduct and refusal of the widow, and the neglect of the heir-at-law, prevented them from obtaining a good title to the premises, and from improving and selling the land during the fall of 1872, and that the time for such sale had, when the bill was filed, December 20th, 1872, gone by. They further allege that the agreement to open the road was a vital part and condition of the contract, and that the road has not been opened, and that this fact further diminishes the value of the premises.

The complainant is properly before the court, seeking as administrator, to compel specific performance of the contract of June 10th, 1872, between his intestate and Hoyt. That contract was valid when it was made, and was so still when John B. Miller died. Though the answer of the heir-at-law sets up fraud and undue influence on the part of Keep and John B. Miller's wife, alleging that they induced Miller to

Miller's Administrator v. Miller.

enter into it, with the sinister design on their part of obtaining by that means, for the wife, through the equitable conversion which might result from the contract, a larger portion of the estate of John B. Miller, at his death, than she otherwise would have been entitled to, yet there is no proof whatever to sustain the charge. On the other hand, the evidence shows that when the contract was made, John B. Miller was not only capable of making it, but possessed sagacity and shrewdness, and acted independently. He employed John W. Hancock, the surveyor, to make a survey and map of the property, after the preliminary agreement of the 25th of April, 1872, had been made. He was with the surveyor part of the time, at least, while the survey was in progress. The surveyor testifies that he thinks that Miller told him for what purpose he wanted the survey and map made, and adds, that he thinks he told him that he had had a proposal to sell the property to some parties. He says his impression is, he made the map in part for Mr. Burnham, who was attorney for the purchaser, to examine the title by; that Mr. Miller gave him what information he had about it; that after he prepared the map, he took it, on the 5th of June, 1872, to Mr. Burnham's office, to Mr. Burnham, and that Mr. Miller went with him there. While there, the witness made a memorandum of the particulars of the bargain, and says he understood, on that occasion, that those particulars were to be in the agreement which Mr. Burnham was to draw. When inquired of as to his reason for noting those particulars in his memorandum, he answered that he was acting as an agent and friend of Mr. Miller in getting out the papers, and supposed that he made those notes for Mr. Miller's assistance and protection. He says Mr. Miller's health, at the time, was pretty good, and that he appeared well, and seemed to understand what he wanted. He says Mr. Miller's memory did not seem to be as tenacious as it had been formerly, and the witness was acting like a clerk, to help him keep the things connected. In answer to an.

Miller's Administrator v. Miller.

inquiry as to what he thought at the time, of the prudence of the agreement in providing for payment of only \$100 in cash at the time of its execution, and the provision for release of any acre, without regard to its comparative value, on payment of \$800, he says : " That matter was discussed between Mr. Miller and myself, and I didn't express any opinion to anybody but him, that I remember ; I don't know that I ought to answer any further. I said to Mr. Miller that I didn't exactly approve of it ; I said to him that I thought it was risky ; I think Mr. Miller understood that Mr. Hoyt contemplated running a street through this property and selling lots off. My talk with Mr. Miller went further than the releasing the lots ; I think I told Mr. Miller that he didn't receive money enough, to begin with, to make it sure and safe to him ; that the value of the trade would turn with him upon the amount of payments which he received ; that he might have to let the thing go as some other property had that he and I knew of, and have to buy it back again ; I think Mr. Miller agreed with me in that, and remarked to me that if they paid him the interest, he would have more money than they had." The witness says he does not know what Mr. Miller understood about the arrangement ; that the title was to be taken by some man to be named by Hoyt, and not by Hoyt himself ; but that Mr. Miller said to him that " Mr. Burnham was cashier, but that he did not know who stood behind it." This witness was, at the time when he testified, over sixty-seven years of age, and he says he had known John B. Miller all his life. He was, therefore, capable of judging as to the capacity of the latter to transact business. Mr. Burnham, attorney of Hoyt, testifies that he thought Miller understood himself very well, as regarded the business in hand ; that he was vigorous in mind and body. David L. Miller, on his cross-examination, admits that, even as late as August, 1872, his father would talk intelligently to any one who came to him on business, and that, even when he was confined to his bed, as he was then, part of the time, he was intelligent. There is no proof of want of capacity,

Miller's Administrator v. Miller.

and, indeed, want of capacity is not distinctly set up in David L. Miller's answer. Though, on the hearing, it was insisted on behalf of David L. Miller, that the contract was an improvident one, yet this defence is not set up in his answer. For obvious reasons, he should have set it up there, if he expected to rely upon it as a defence. The evidence of improvidence is, it is insisted, to be found in the agreement for release of any acre of the land, on receipt of \$800. Whether this was an improvident bargain or not, must depend on the value of the land. That Mr. Miller considered the property well sold, is evidenced by his remark to Hancock, above quoted, when the latter spoke to him of this feature of the contract. The contract was a valid one, and it worked an equitable conversion of the land into personalty from the time when it was made. See the cases cited in the notes to *Settles v. Ashburner*, 1 W. & T. Lead. Ca. in Eq. 546, 59]; *Smith v. Hubbard*, 2 Dick. 730; *Story's Eq. Jur.*, 790; *Champion v. Brown*, 6 Johns. C. R. 398; *Mulford v. Friers*, 2 Beas. 1; *King v. Ruckman*, 6 C. E. Green 599. And on the principle of equitable conversion, the purchase money became a part of John B. Miller's personal estate, and, such, was distributable to his widow and next of kin. See *Rebb's Case*, *Freem.*, Ch. R. 41; *Baden v. Countess of Pembroke*, 2 Vern. 215; *Hawley v. James*, 5 Paige 323, 456; *Drenth's Estate*, 3 Barr 377; 1 Sugd. Ven. (8th Am. ed.) 287. In *Lawes v. Bennet*, 1 Cox 167, it was held that, where an estate is contracted to be sold, it is, in equity, considered as converted into personalty from the time of the contract, and that this notional conversion takes place, although the election of purchase rests merely with the purchaser. See also *Ripley v. Waterworth*, 7 Ves. 425, 437; *Townley v. Bedwell*, 14 Ves. 591; *Daniels v. Davison*, 16 Ves. 249; *Collingwood v. Row*, 3 Jur. N. S. 785; *Goold v. Teague*, 5 Jur. N. S. 116; *Farrar v. Earl of Winterton*, 5 Beav. 1. And in *Curre v. Bowyer*, reported in a note to *Farrar v. Earl of Winterton*, it was held that, where the contract is binding at the death of the vendor, although the purchaser by subsequent laches loses

Miller's Administrator v. Miller.

his right to a specific performance, yet the estate will belong to the next of kin, and not to the heir-at-law. In *Att'y Gen. v. Day*, 1 *Ves., Sen.*, 220, it was held, however, that such conversion will not take place where the court holds that the contract cannot, or ought not to, be performed. This contract is not within either of those exceptions. It can, and ought to, be performed. As the case stood at the filing of the bill, a complete title could have been made to the purchasers. The judgments against David L. Miller would have been decreed to be no liens upon the property, for, in equity, on the execution of the contract, John B. Miller became trustee of the property for the purchasers, and, at his death, David L. Miller became such trustee in his stead. The complainant, by the bill, tendered a release of the widow's dower, on the performance of the agreement, and David L. Miller could have opened the road provided for in the contract.

But, it is urged on behalf of David L. Miller, that the court ought not to decree performance, because the agreement for a release of the property, on the payment of \$800 per acre, is inequitable; and he and the purchasers object also to such decree, because the widow, as they allege, by her conduct after the death of John B. Miller, and before the filing of the bill, precluded herself from the benefit of the contract. The purchasers further object, because of laches on the part of complainant. No objection is made by the purchasers that, if a conveyance be decreed, the deed to be made by the heir-at-law cannot be a compliance with the agreement, so far as the covenants stipulated for are concerned; nor is any question raised on that score, or on the ground of any uncertainty as to the road. As to the first of these objections: As already remarked, it does not appear that the provision for release, on payment at the rate of \$800 per acre, is inequitable; and, if it were, this court would not decree performance of it, except on such terms and with such restrictions as to secure equity in the premises. *Emmons v. Hinderer*, 9 *C. E. Green* 39; *Ensign v. Colburn*, 11 *Paige* 503. The second objection is not sustained by the evidence. The widow does not appear to

Miller's Administrator v. Miller.

have refused to release her dower ; indeed, she does not appear to have ever been requested to do so. David L. Miller did not ask her to release, nor did the purchasers. It is alleged that, on the morning of the 1st of October, 1872, she left her residence in Madison, in order to avoid an application for a release, but David L. Miller neither made nor sent to her any request to release ; and, although one of the purchasers, Mr. Reddish, with Mr. Burnham, left Madison in the same railroad car with her, they neither of them said anything to her on the subject, although Mr. Reddish had an interview with her in the car. If it be admitted that the witness, Mary F. Young, refers to this occasion, she contradicts the statement of the answer of Hoyt, Reddish, and Ohlen, that the widow left this state, for she says she went to Orange. It does not appear from the testimony of this witness, that, on the occasion to which she refers, the widow remained away from her home for more than the day ; and, indeed, the testimony of this witness is by no means sufficient to induce the conclusion that the widow was at any time unwilling to release her dower, in order to prevent the performance of the contract. It is not to be forgotten in this connection, that it appears by the evidence of Mr. Burnham, that he had notice on the afternoon of the 1st of October, 1872, that the widow was willing to release her dower on such a payment as would secure her rights.

It remains to consider the last objection. There is nothing in the terms of the contract itself, in the nature of the property, or of the attendant circumstances, which would make it inequitable for this court to interfere, and decree performance of this contract, although the heir-at-law was, on the first day of October, 1872, unable fully to perform the contract. It seems evident, from the testimony, that the purchasers, when that demand was made, did not expect performance. It would, perhaps, not be too much to say, that they did not desire it. They expected that the heir-at-law would not be able to give them a title free of the widow's dower. Had they desired performance, they would probably have taken

Miller's Administrator v. Miller.

some steps to ascertain, at least, whether she would be willing to release. Yet, although, as before mentioned, Messrs. Reddish and Burnham saw her in the railroad car, and the former had an interview with her there, immediately after his interview that morning with David L. Miller, in which Messrs. Reddish and Ohlen made the tender, and demanded performance, and Miller, with their consent, deferred his reply until the afternoon of that day, yet neither Burnham nor Reddish appears to have made any reference to the subject. If, as Mr. Reddish testifies, he and his associates were very anxious that the agreement should be performed on the first day of October, when they made the tender, it seems strange that they should not even have inquired of the widow, on that day, as to her willingness to release her dower, and that they took no action whatever, upon the assurance given to Mr. Burnham by the complainant's solicitor on the 1st of October, that the widow was ready to sign a release on such payment being made as would secure her rights. Besides, it is in evidence that Mr. Burnham, the attorney for the purchasers, subsequently to the 1st day of October, 1872, and after the demand made upon David L. Miller in the afternoon of that day, in answer to something said to him by the solicitor of the complainant on the subject of time, said that he did not think there was any necessity for immediate haste. Mr. Burnham acted for the purchasers from the beginning, and was their agent in the matter. It was he to whom John B. Miller applied for an extension, and it was by him that the desired extension was accorded. His acts and declarations in the matter were binding on the purchasers. I see nothing in the answer or evidence, to lead me to conclude that the delay in filing the bill from the 1st of October to the 20th of December following, should bar the complainant from a decree for performance of the contract. He is entitled to a decree accordingly.

There will be a decree, therefore, that David L. Miller convey, in fee simple, to Reddish and Ohlen, the premises in question, and that he open (that is, lay out to public use,) the road

In the matter of the will of Samuel Swartwout.

provided for in the contract, according to the agreement. Miller's wife will be decreed to be entitled to no dower in the property. Hoyt, Reddish, and Ohlen will be decreed to pay to the complainant the purchase money remaining unpaid, that is to say, the sum of \$4900, with interest thereon from the filing of the bill, December 20th, 1872, and to execute and deliver to the complainant their bond for the residue of the purchase money, \$34,392, payable on the 20th of December, 1879, seven years from the date of the filing of the bill, with interest from June 20th, 1874, payable annually, with provision that if any payment of interest shall be in arrear and unpaid for sixty days after the day on which it shall become due, the whole of the principal shall, at the option of the obligee and mortgagee, or his legal representatives, be at once due and payable; the payment of the bond to be secured by their mortgage upon the premises, to be duly executed and acknowledged and delivered by them; and that Hoyt, Reddish, and Ohlen pay to the complainant interest on the sum of \$34,392, from June 20th, 1873, six months from the time of filing the bill, to the 20th day of June, 1874. The money and securities which shall thus come to the hands of the complainant, are to be administered by him in a due course of administration, and the administrators of the widow will be entitled to receive from him the amount of her distributive share thereof. The complainant is entitled to costs as against all the defendants, except the administrators of the widow.

In the matter of the will of SAMUEL SWARTWOUT, deceased.

The right to prize money vests in the captor from the time of the capture, and not from the condemnation. Hence, prize money for prizes not condemned for six years after the captor's death, was adjudged to pass to his legatee, under a residuary clause: "all the residue of funds now held by me, and all property to which I may become entitled."

In the matter of the will of Samuel Swartwout.

Mr. John S. Barkalow, for the executor.

THE CHANCELLOR.

The late Commander Samuel Swartwout, of the United States Navy, by his last will and testament, dated December 25th, 1866, after making certain specific bequests and a bequest of a specified sum of money, disposed of the residue of his estate, describing it as "all the residue of funds now held by me, and all property to which I may become entitled." Having participated in certain captures in the late rebellion, he was, under the act of Congress then in force on the subject, entitled to prize money in respect thereof, on condemnation of the captured effects. A controversy having arisen between the next of kin of the testator and the residuary legatee, as to whether that money passes under the residuary bequest, the executor, Rear Admiral Bell, seeks, by this proceeding, the direction of this court in the premises.

The testator died on the 5th of February, 1867. The condemnation in the cases from which the prize money was derived did not take place until June 7th, 1873, and the adjudication was not made until April 20th, 1874. It is insisted on behalf of the next of kin, that prize money is of the nature of bounty, and that the title to it does not accrue until condemnation, and that, therefore, in this case it did not pass as part of the residue, to the residuary legatee. This position cannot be maintained. The act of Congress above referred to, gave to the testator his share of the prize money from the captures in which he took part, and the right to it was vested in him at his death, although condemnation had not then taken place. It is settled that prize money is assignable at common law before condemnation, and that, after condemnation, the title becomes, by retroaction, perfect in the assignee. *Morrrough v. Comyns*, 1 Wils. 211; *The Schooner Sally*, 1 Gall. 401; *The Brutus*, 2 Gall. 526. The very question now under consideration was decided in *Sterens v. Bagwell*, 15 Ves. 139, under circumstances quite similar to those of the present case. There the testator, a lieutenant in the British Navy, was concerned in

In the matter of the will of Samuel Swartwout.

the capture of a Dutch fort in the East Indies, in July, 1781. He died in December, 1782. A suit in the Admiralty Court upon the legality of the capture and the distribution of the prize money, was pending at the time of his death. He left a will, dated December 28th, 1776. The question was, whether the money passed under the residuary bequest in his will. Sir William Grant, M. R., in deciding the case, said that if the captured effects had, after the death of the testator, been condemned as prizes to the captors, there could be no doubt that his share would have passed by his will; as, though the property was not completely vested in the captors until condemnation, yet after condemnation it was, by relation, considered theirs from the time of the capture; that the captured effects being condemned to the crown, no right to any part of the produce could accrue to any one except by the gift of the crown, and as the testator died before any gift was made, his will could have no direct operation upon the subject of the gift, but that the intention of the crown, in all cases of that kind, was to put what was in strictness a matter of bounty upon the footing of matter of right; that the service performed was thought worthy of reward, and though the party performing it died before payment, the claim of bounty from the crown was considered as transmissible to his representatives in the same plight and condition as the claim for wages or any other stipulated or legal remuneration of service; that in such cases the crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift; that the representatives to whom the crown gives are those who legally sustain that character, but the gift is made in augmentation of the estate, and not by way of personal bounty to them; that they take subject to the same trusts upon which they would have taken wages or prize money to which the party from whom they claim might have been legally entitled, and that the representatives of the testator were therefore entitled to receive that money, but upon the same trusts as they would take his general estate, and that it was to be considered as if it had

Upton and Williamson v. New Jersey Southern Railroad Co.

been actually a part of his property at the time of his death, and the consequence was that his residuary legatees were entitled to it. See also *Alexander v. The Duke of Wellington*, 2 *Russ. & Myl.* 35. It will be seen that *Stevens v. Bagwell* is directly in point, and the principle of that case disposes of all the objections made by the next of kin here, and is decisive of the right of the residuary legatee to the prize money in question. It is clear that the testator intended that this money should pass by the residuary bequest, and no legal obstacle is presented to the effectuation of that intention. The executor will be directed accordingly.

UPTON and WILLIAMSON, TRUSTEES, vs. THE NEW JERSEY
SOUTHERN RAILROAD COMPANY and others.

1. When the jurisdiction of a state court has once attached to a suit, no subsequent change in the condition or residence of a party can oust it, without express provision to that effect. Hence, the court refused an application to remove into a Federal court a suit brought by a citizen of this and a citizen of another state, against defendants, some of whom were citizens of this, and some, citizens of another state, made on the ground of the death of the non-resident complainant.

2. The fact that a bill prays an injunction, will not, without reference to the object and purpose of the bill, be regarded as of itself sufficient to bring the suit within the meaning of the words of the act of Congress of July 27th, 1866: "a suit brought, instituted, and prosecuted for the purpose of restraining or enjoining the defendant," and to afford a ground of removal into a Federal court, under that act.

On motion for order to remove the cause as to Jay Gould, one of the defendants, to the Circuit Court of the United States.

Mr. W. J. A. Fuller, of New York, for the motion.

Mr. J. Vanatta, contra.

Upton and Williamson v. New Jersey Southern Railroad Co.

THE CHANCELLOR.

Jay Gould, a citizen of New York, applies, under the act of Congress of July 27th, 1866, for an order removing this cause, as against him, into the Circuit Court of the United States. The suit was instituted by George B. Upton, then a citizen of Massachusetts, and Benjamin Williamson, then and now a citizen of this state. They were trustees of the bondholders, under a mortgage given by the Raritan and Delaware Bay Railroad Company (subsequently, by change of name, The New Jersey Southern Railroad Company,) of which, by this suit, they sought a foreclosure and the sale of the mortgaged premises. By order of the court, after an interlocutory decree *pro confesso* against all the defendants had been made, the complainants were directed to file a supplemental bill, in order to bring before the court all the parties in interest, in reference to certain property which the complainants claimed under the mortgage, but which claim was disputed. An original bill, in the nature of a supplemental bill, was accordingly filed in the cause, against Jay Gould and other persons, not before made defendants in the cause, some of whom were citizens of this state, and some of other states. After the filing of this bill, George B. Upton died, leaving Benjamin Williamson, his co-trustee, surviving. After the death of Mr. Upton, the application for removal was made. It is made under the act of Congress of July 27th, 1866, which provides that, "if in any suit already commenced, or that may hereafter be commenced, in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the state in which the suit is brought, is, or shall be, a defendant; and if the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a state other than that in which the suit is brought, is, or has been instituted or prosecuted for the purpose of restraining or enjoining him; or if the suit is one in which there can be a final determination of the controversy,

Upton and Williamson v. New Jersey Southern Railroad Co.

so far as it concerns him, without the presence of the other defendants as parties in the cause; then, and in every such case, the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him, into the next Circuit Court of the United States, to be held in the district where the suit is pending," &c. It was conceded on the argument, by the counsel of the applicant, that, until the death of Mr. Upton, the former could have made no claim to the right of removal, for the suit had been commenced by a citizen of another state, in conjunction with a citizen of this state.

In the case of *The Sewing Machine Companies*, 18 Wall. 553, (1873,) the court said, that where plaintiff and defendant are both citizens of a state other than that in which suit is brought, the acts of Congress make no provision for removal, and that if the act of 1866 be divested of the feature which provides for a severance of the defendants, and that which empowers the plaintiff to proceed with the suit in the state court as against the other defendants, the act is exactly the same as the corresponding feature of the judiciary act, except that it extends the time for filing the petition for the removal of the cause. The counsel of the applicant insists that, by reason of the death of Mr. Upton, whereby the action has become a suit between a citizen of this state alone, as complainant, and the applicant and others, some citizens of this, and some of other states, as defendants, he has become entitled to the right to remove the cause into the Federal court. Whether he is so or not, must depend on whether the accident of death entitles him to the right. Had the other trustee died, and Mr. Upton survived, that accident would have conferred no right of removal on the applicant. And, again, on this theory, if another trustee, a citizen of a state other than this, had been appointed in the place of Mr. Upton, and had been admitted as a complainant in the suit before the application for removal was made, the right to remove, which, it is insisted, was acquired by Mr. Upton's

Upton and Williamson v. New Jersey Southern Railroad Co.

death, would have been lost by such subsequent action. Jurisdiction does not depend on such accidents, nor, in my judgment, does the right of removal. No change in the condition or residence of the parties can take away a jurisdiction which has once attached. In *Morgan's Heirs v. Morgan*, 2 Wheat. 290, one of the complainants in the original suit, which was in the Circuit Court of Kentucky, removed to and settled in that state, after the bill was filed, and it was insisted that, therefore, the court could no longer entertain jurisdiction of the cause, but ought to dismiss the bill. It was held that the jurisdiction having once vested, was not divested by the change of residence of either of the parties. In *Clarke v. Mathewson*, 12 Peters 170, the question was, whether a bill of revivor, filed by an administrator who was a citizen of Rhode Island, against defendants, all of whom were citizens of that state, could be maintained in the Circuit Court of the District of Rhode Island. The intestate complainant in the original suit, was a resident of Connecticut. It was held, reversing the decree of the Circuit Court, 2 Sumn. 262, that the parties to the original suit were citizens of different states, the jurisdiction of the court completely attached to the controversy, and having so attached, it could not be divested by any subsequent events. In *Mollan v. Torrance*, 9 Wheat 537, it was held that a plea to the jurisdiction of the Circuit Court must show that the parties were citizens of the same state at the time the action was brought, and not merely at the time of plea pleaded. The court said: "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." In *Dunn v. Clarke*, 8 Peters 1, the complainants in the court below filed their bill, praying for an injunction to a judgment recorded against them in an action of ejectment, and to obtain a decree for the conveyance of the land in controversy. All the complainants were residents of Ohio, and so were the defendants. The judgment had been obtained by a citizen of Virginia, who had since died, and the defendant held under his will.

Upton and Williamson v. New Jersey Southern Railroad Co.

The court said, they entertained no doubt that jurisdiction of the case might be maintained so far as to stay execution on the judgment. The defendant was the representative of the plaintiff in the suit at law, and, although he was a citizen of Ohio, that fact could not, under the circumstances, deprive the court of an equitable control over the judgment ; that the Circuit Court had jurisdiction of the action at law, and no change in the residence or condition of the parties could take away a jurisdiction which has once attached ; that if the plaintiff in the action at law had lived, the Circuit Court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel, and as the defendant in the injunction suit was his representative, the court might do the same thing as against him ; that the injunction bill was not considered an original bill between the same parties as at law ; but if other parties were made in the bill, and different interests involved, it must be considered, to that extent, at least, an original bill ; and the jurisdiction of the Circuit Court must depend on the citizenship of the parties. Said the court, in *Kanouse v. Martin*, 15 Howard 198, 208 : “ Without any positive provision of any act of Congress to that effect, it has long been established that, when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it.” In the case last referred to, it was held that, under the twelfth section of the judiciary act, a defendant had a right to remove an action from a state court to a Federal Circuit Court, if the sum demanded in the declaration exceeded \$500, and that he could not be deprived of the right by an amendment reducing the sum, allowed by the state court after the right of removal was complete. *Gordon v. Longest*, 16 Pet. 97, is to the same effect. In *Wright v. Wells*, Peters C. R. 220, a cause was removed from a state court, and the plaintiff declared in the Circuit Court of the United States, laying his damages at \$500. On rule to show cause why the suit should not be remanded to the state court, on a suggestion that the sum demanded was less than \$500, the court, in

Upton and Williamson v. New Jersey Southern Railroad Co.

discharging the rule, said : " In this court, the plaintiff has laid his damages at five hundred dollars, which is sufficient for the jurisdiction of this court, and it cannot be ousted by the plaintiff's releasing so much of his demand as to reduce it below that sum."

The applicant's right to remove the cause does not depend on accident, but on the provisions of the law as applicable to the condition of the parties at the time of the commencement of the suit. If a removal should take place under the circumstances of this case, and after it had been effected, a citizen of a state other than this, should be appointed trustee and made complainant in the place of Mr. Upton, it is almost too obvious for remark that that would not affect the jurisdiction of the Circuit Court. The language of the act has direct reference to the commencement of the suit, and to the commencement alone. " If, in any suit already commenced, or that may hereafter be commenced in any state court, against an alien, or by a citizen of the state in which the suit is brought," &c. It will be seen that the act, by its very terms, applies to suits *commenced* against an alien or citizen of another state than that in which the suit is brought in the state court. It is not to be doubted that the time when a defendant is brought into a suit already commenced, is the time at which the suit is to be regarded as being commenced as to him. The act makes no provision for removal in case of a suit commenced by a citizen of the state in which the suit in the state court is brought and a citizen of another state against an alien, or a citizen of another state and a citizen or citizens of the first mentioned state. If Mr. Upton had, after the suit was commenced, removed from Massachusetts into, and become a citizen of New Jersey, this would not have given the applicant the right to remove the cause, for the suit would still have been a suit *commenced* by a citizen of New Jersey and a citizen of Massachusetts, and on the principles illustrated in the above cases, the question would not have been affected by such removal. *Morgan's Heirs v. Morgan, supra*. For the like reason the death

Upton and Williamson v. New Jersey Southern Railroad Co.

of that one of the two complainants, who was a citizen of Massachusetts, cannot affect the question of removal.

These considerations lead me to the conclusion that the applicant is not entitled to a removal of the cause. But there are other considerations conducing to the same result. The suit, so far as relates to the applicant, is not brought, nor is it nor has it been instituted or prosecuted, for the purpose of restraining or enjoining him within the meaning of the act. That, indeed, is one of the objects, but it is incidental merely. The main object of the bill as to him is clearly shown by the prayer, which is "that it may be decreed that the New Jersey Southern Railroad Company owed nothing to said Jay Gould when he became possessed of said one thousand six hundred and nineteen shares of stock, and to that end, that an account may be taken of his dealings with the said company and with its earnings and property, either through its directors or otherwise; and that it may be decreed that he acquired no title to said stock, and that his sale of said stock may be decreed to have been illegal and fraudulent and may be set aside; and that said James and Field may be decreed to have no valid title to said stock and to surrender the certificate thereof; and that the said steamboats "Jesse Hoyt" and "Plymouth Rock," may be decreed to be the property and part of the plant of the New Jersey Southern Railroad Company and subject to the lien of your orators' mortgage; and that said Jay Gould may be decreed to redeem the same from all maritime liens thereon and from any pretended sale thereof, and to return said steamboats within the jurisdiction of this court, to the end that they may be sold under the decree in this cause; and that for the same end, said Gould may be decreed to return within the jurisdiction of this court, two locomotive engines, one passenger car, thirty-three flat cars, and ten box cars, belonging to said last named company and covered by your orators' mortgage, and which were removed by and are now held by him on his said railroad in Delaware and Maryland; and that said locomotives and cars may be decreed to be subject to the lien of

Barrett v. Doughty.

your orators' mortgage; and that the said East End Hotel and the furniture and equipment thereof, may be decreed to be the property of and part of the plant of the said company, and not the property of Jay Gould or of any other person, and to be subject to the lien of your orators' mortgage."

It will be seen that the bill is not what is commonly known as an injunction bill, but is a bill for an account and for the delivery of certain property, real and personal, alleged to have been mortgaged to the complainants, and to have been wrongfully taken into possession and claimed by the applicant, and by him held or disposed of for his own benefit. The injunction prayed against him and the other defendants is incidental to the relief sought by the bill. Surely, the fact that a bill prays an injunction will not, without reference to the object and purpose of the bill, be regarded as of itself sufficient to bring the suit within the description contained in the act, and therefore to entitle it to be considered within the meaning of the act, a "suit brought, instituted and prosecuted for the purpose of restraining or enjoining the defendant." It is too obvious for elucidation, that there can be no final determination of the controversy in this suit, as far as it concerns the applicant, without the presence of the other defendants as parties in the cause. *Smith v. Rines*, 2 Sumn. 338.

Entertaining these views in reference to this application, I am constrained to refuse to make an order for removal.

BARRETT and wife vs. DOUGHTY.

1. A husband is not a proper party complainant to a bill by his wife for a reconveyance to her of land which she and her husband conveyed to the defendant, and which was then her separate estate.

2. Leave given to amend by substituting a proper and responsible person as next friend of the wife, and making the husband a party defendant.

Barrett v. Doughty.

3. A misjoinder may be assigned as cause for demurrer, *ore tenus*, at the argument, though a general demurrer for want of equity be overruled.

4. It is the settled practice, that where a demurrer is put into the whole bill for causes assigned on the record, if those causes are overruled, the defendant will be allowed to assign other causes, *ore tenus*, at the argument, but the demurrer *ore tenus*, must be for some cause which covers the whole extent of the demurrer.

On bill and general demurrer.

Mr. Alex. H. Sharp, for the demurrer.

Mr. F. F. Westcott, contra.

THE CHANCELLOR.

The bill is filed by husband and wife to obtain a reconveyance to the latter, of land which she and her husband, her co-complainant, conveyed to the defendant, and which was then her separate estate, and for an account of the rents and profits since that conveyance. The defendant demurred for want of equity, and on the argument assigned for cause of demurrer, among other things, multifariousness and misjoinder of husband and wife as complainants. The bill has equity. It is not multifarious. But according to the practice as settled in this court by *Johnson v. Vail*, 1 *McCarter* 423, the demurrer must be allowed on the ground of misjoinder. It was insisted on the argument, that the objection on that ground could not be entertained under the demurrer on record. But the practice on this point is thoroughly settled. Where a demurrer is put in to the whole bill for causes assigned on the record, if those causes are overruled the defendant will be allowed to assign other causes of demurrer, *ore tenus*, at the argument, but the demurrer *ore tenus*, must be for some cause which covers the whole extent of the demurrer. *Story's Eq. Pl.*, § 464; *Stillwell v. McNeely*, 1 *Green's Ch. R.* 305; *Garlick v. Strong*, 3 *Paige* 440; *Wake v. Parker*, 2 *Keen* 59. The demurrer is allowed, but without costs. Leave will be given to amend by substituting a proper and responsible per-

Lore v. Stiles.

son as next friend of the wife, and making the husband a party defendant. The amendment is to be made within thirty days from the date of the order to be made in pursuance of this decision. In default thereof, the bill will be dismissed.

LORE and others vs. STILES and wife.

1. Where a general grant is made of two acres of land adjoining or surrounding a house, part of a larger quantity, the choice of the two acres is in the grantee, and a devise is to be considered as a grant.

2. The grantee of such devisee has the right of selection, if not made before the conveyance to him.

3. If the selection cuts off the owners of the rest of the land from access thereto, a way of necessity exists in their favor over the land selected.

On final hearing on pleadings and proofs.

Messrs. Potter and Nixon, for complainants.

THE CHANCELLOR.

Henry Bradford, late of the county of Cumberland, deceased, by his will, dated November 26th, 1859, devised as follows: "I give and bequeath to my wife Sarah, the house and lot where Ebenezer Whitaker now lives, and also two acres of land, purchased of Ebenezer Westcott, adjoining the above mentioned lot, to have the same during her natural life, and after her death to go to my son Enos." His wife survived him. On her death, Enos took possession of the house. The property is in the village of Newport, in Cumberland county. Enos afterwards conveyed the devised premises in fee to Daniel T. Davis, by whom the same were conveyed in fee to Sarah Stiles, one of the defendants, who is one of the daughters of the testator. The testator, at his death, owned in fee simple about seven acres of land adjoining the house

Lore v. Stiles.

lot above mentioned. That land he had purchased of Ebenezer Westcott, part of it in 1815, and the rest in 1823. It adjoined the house lot (which is in shape a parallelogram,) on the entire southwesterly and northeasterly side of the latter. It had a front of thirty-five rods and sixteen links on the road leading to Newport Neck, and a front of seven rods and twenty-three links on Main street. About one acre (the part fronting on Main street,) was devised to the testator's son James. At the testator's death, the two acres were not designated in any way. Neither the widow nor Enos fenced them off, or in any other way designated them. Davis, after his purchase from Enos, selected them and fenced them off. By his selection, he located them on the road, taking for the purpose a piece of the depth of the house lot, extending from the southerly line of that lot to the southerly line of the Westcott land, and being about nine rods deep and including the whole front of the property on the road to Newport Neck. It does not appear when this was done, but it must have been prior to the 31st of January, 1863, for his deed to Mrs. Stiles is dated on that day. The bill alleges that the testator made no disposition of the rest of the five acres by his will, and that it belongs by descent to the children of the testator, all of whom but one are living, and the children of his deceased son James. The bill is filed by the children of the testator and those of James, with the husbands of such of them as are married women, against Mrs. Stiles and her husband. It states that the division made by Davis was without the knowledge or consent of the heirs-at-law of the testator, and the complainants allege that if it be permitted to stand, they will be cut off from access to their land from the road or street; that there is no other way of access to their land, and that the land fronting on the street is valuable for building lots, and the loss of any part of the frontage would be material to them. They propose a division, by which part of the land lying on the street will be assigned to the heirs-at-law, and the object of the bill is to obtain such division. The testator evidently intended that his widow

Lore v. Stiles.

and Enos should be free to locate the two acres as they might choose, for he not only does not impose any restrictions on their choice, but does not devise the rest of the five acres specifically, and directs that all of his land not specifically disposed of by the will, be sold, and that the money arising from the sale, after deducting expenses, be, with the residue of his personal estate, equally divided among his children. He, however, as before stated, devised another part of this Westcott property to his son James, the part which fronts on Main street. It appears that since the testator's death, a street has been opened east of that part of the five acres which was left after fencing off the two acres taken by Davis, and that part of that residue fronts for a considerable distance on that street, and thus access to it is provided. If this were not so, a way of necessity would exist over the two acres, in favor of the owners of the rest of the five acres. The value of the land in question for building purposes, was undoubtedly far less at the date of the testator's death, which took place about 1860, than it is at present, if indeed there was any demand for it for those purposes; and in the eleven years which elapsed between the fencing off of the two acres by Davis and the filing of the bill in this cause, the property has probably risen in value, and a reason for disturbing the selection may present itself now to the heirs-at-law, which perhaps did not exist, either at the testator's death or when the division was made. However that may be, the location had been made, and as far as appears, acquiesced in for over eleven years, when the bill was filed. The relief sought by the bill cannot be granted. The right of the widow and Enos, or their grantees, to select and locate the two acres, is undoubted. Where a general grant is made of a certain number of acres of land adjoining or surrounding a house, part of a larger quantity, the choice of the land granted is in the grantee, and a devise is to be considered as a grant. *Hobson v. Blackburn*, 1 *Myl. & K.* 571, 575; *Duckmanton v. Duckmanton*, 5 *H. & N.* 219; 1 *Jarman on Wills* 320; *Jacques v. Chambers*, 2 *Coll.* 435; *Vin. Abr.*, 8 *Vol.*, p. 48, pl. 11.

The bill will be dismissed.

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

THE MORRIS AND ESSEX RAILROAD COMPANY and THE
DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY vs. THE HUDSON TUNNEL RAILROAD COM-
PANY and HASKINS.

1. The Hudson Tunnel Railroad Company, claiming to be a corporation organized under the General Railroad Law, having entered upon land of complainants without their consent, and having made large excavations therein, were restrained from further prosecuting their work until they should make compensation.

2. Such entry having been made, not only without the permission, but against the warning and protest of the complainants, the defendants have no equity to be permitted to proceed with their work, even in view of their effort to make compensation, on the ground of acting in good faith in beginning their work, and under misapprehension of the authority of the municipal authorities (by whose permission they entered) over part of the premises. There is neither mistake, accident, or exigency.

3. That part of the land taken was part of a public street, does not affect the right of the owners to compensation.

4. The necessity of first making compensation is not avoided by the plea that the work in which the defendants are engaged is an exploration. It is not the exploration contemplated by a charter, giving license to enter upon lands to *explore*, &c.

5. Equity will enjoin a trespass which is continuous, and invades proprietary rights.

On bill and answer, and affidavits annexed to each. On order to show cause why an injunction should not issue.

Mr. Vanatta, for complainants.

Mr. John Linn, for defendants.

THE CHANCELLOR.

The complainants, by their bill, pray, among other things, that the defendants, The Hudson Tunnel Railroad Company and Dewitt C. Haskins, president of that company, may be

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

restrained from entering upon land of the complainants, in Jersey City, and from doing any act thereon, in or for the construction of their proposed tunnel under the Hudson river. The land in question is bounded on its southerly side by the middle line of what is called Fifteenth street. The complainants, more than a year ago, as they allege, and about six months ago, as the defendants admit, erected a fence on a line about five feet distant northerly from the above mentioned middle line, and extending about eighteen hundred feet from Provost street to the river. They allege that they and those under whom they claim, have been, for a long time past, in the peaceable and lawful occupation of the premises. They deny that Fifteenth street has ever been laid out, opened, or worked, or in any way improved as a public street, over the premises in question, or that it has ever had any existence as a public street or highway there.

On the 18th of November last, the defendants entered on the premises, then in the exclusive possession of the complainants, and broke down and removed part of the fence above mentioned, and commenced digging there a large shaft, thirty feet in diameter, partly on the land in complainants' possession, and partly on land claimed by The Jersey Shore Improvement Company, and from that time until they were stopped by the *interim* injunction in this suit, they were engaged in that work with a large force of workmen. The bill alleges, and the statement is not denied, that the defendants have occupied, and are still occupying, the land claimed by the complainants, with large quantities of earth and other matter, thrown out in making the excavation, and have placed and deposited there engines, machinery, and tools, and large quantities of brick, timber, and other materials, to be used in the construction of the shaft; and that they have erected, partly on the complainants' premises, and partly on property claimed by The Jersey Shore Improvement Company, a large temporary building, about seventy-five feet long, and about forty-eight feet wide. The shaft is circular

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

in shape, and is being lined with a brick curbing of three and a-half feet in thickness.

The defendants claim to be a corporation under the act "to authorize the formation of railroad corporations, and regulate the same," (*Pamph. L.*, 1873, p. 88,) commonly known as the General Railroad Law; and they propose, as appears by their articles of association, to construct, under the provisions of that act, a subterranean and submarine railroad, to run through a tunnel, "from some convenient and eligible point upon the western shore of the Hudson river, and within or near Jersey City or Hoboken, and thence to run by the most direct and feasible route, under the bed of that river, to a convenient and eligible point in that part of the boundary line between the states of New Jersey and New York, lying between Jersey City or Hoboken, and the city of New York, there to connect with another railway to be similarly constructed under the laws of the state of New York, and extending into the city of New York." They seek to justify their entry upon, and occupation of, the premises, by a license from the board of aldermen of Jersey City. They allege, also, that their work is a mere exploration, and, therefore, may be regarded as but temporary in its character; and they insist that their occupation of the premises is, at most, a trespass, of which this court, on well recognized principles, will not take cognizance, and for which an ample remedy exists at law.

The bill raises the question whether the tunnel company is a lawful corporation, entitled to exercise the powers conferred by the general railroad law. It alleges that the land which the defendants have occupied, is "necessary, essential, and indispensable" to the complainants for the purposes of their franchises, and claims that, therefore, the tunnel company, if they are indeed entitled to the benefit of the provisions of the general railroad law, are, by the thirty-sixth section of that act, prohibited from taking that land, or any part of it, by condemnation or otherwise. It is unnecessary to consider either of these questions in disposing of the present motion. That the tunnel company have not made compensation to the

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

complainants for the land claimed by the latter, which the former occupy, and propose to take for their shaft and tunnel, is admitted. It appears that recently, and after they had entered upon the premises, and had taken possession thereof, they instituted proceedings, which are still in progress under the provisions of the general railroad law, to obtain an appraisal of the complainants' damages for the land taken and proposed to be taken. The fact that the complainants and those under whom they claim, have for a long time past been in peaceable possession of the premises, is not denied by the answer or the affidavits annexed thereto. That the tunnel company, if authorized to take the land, were bound to make compensation to the complainants before entering upon their property, will admit of no question. The general railroad law expressly provides that payment or tender of all damages for the occupancy of lands through, under, or upon which any railroad laid under the authority of that act, and its conveniences, appurtenances, and appendages may be laid out or located, shall be made before the company, or any person under their direction or in their employ, shall enter upon or break ground in the premises, except for the purpose of surveying and laying out the road and its conveniences, appurtenances, and appendages, and of locating the same, unless the consent of the owner of the land be first obtained. This right to compensation is secured by the provision of the Constitution, that private property shall not be taken for public use without just compensation, and that individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners. If it be admitted that the premises in question are part of a public street, this will not affect the right of the complainants to compensation. It is settled, in this state, that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway, without making compensation to the owner of the soil

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

occupied by the highway. *Starr v. Camden and Atl. R. R. Co.*, 4 Zab. 592; *Central R. R. Co. v. Hetfield*, 6 Dutcher 206. "It would seem to follow," says Chancellor Green, treating of this subject in *Hinchman v. Paterson Horse Railroad Co.*, 2 C. E. Green 75, 78, "that the owner of the soil under a highway, cannot be deprived of his property, or be prejudiced in any right therein, without compensation, even by express authority of the legislature, without a violation of the provision of the Constitution, which declares that private property shall not be taken for public use without just compensation." He adds, that this is especially true where the land taken is applied exclusively to the use of the railroad, as by tunneling under the highway for the railroad track. The case is not altered by the fact that the highway is a street in a city. *People v. Law*, 34 Barb. 494. Nor can the defendants escape from the necessity of making previous compensation in this case, by the plea that the work in which they are engaged is an exploration. They propose to sink their shaft to the depth of sixty-five feet, and if no insuperable difficulty presents itself, to proceed from the shaft to the construction of their tunnel, working it through the shaft. Though, in a certain sense, the shaft may be said to be an experimental work, and the enterprise tentative, it is obviously an abuse of language to term the work an exploration, within the meaning of the eleventh section of the general railroad law, by which license is given to enter upon lands or waters for the purpose of exploring, surveying, leveling, and laying out the route of, and locating, any railroad which it is proposed to construct under that act. Nor can the action of the defendants be regarded as a mere trespass. If the complainants' proprietary rights have been invaded, they are entitled to protection. Besides, the trespass is of a continuous nature. The defendants claim to be a corporation under the law of this state, and to be exercising powers derived from that law. They cannot be permitted to violate a provision of that law, intended to secure a constitutional right.

The defendants further insist that inasmuch as they have

Morris and Essex Railroad Co. v. Hudson Tunnel Railroad Co.

already begun their work, acting *bona fide*, and at least under a misapprehension as to the authority of the municipal authorities over the premises, (they claim, however, that those authorities had full power over the subject,) they ought to be permitted to proceed, especially in view of the effort they are making to make compensation. But this case presents no equity in their favor. There is neither accident, mistake, nor exigency. They were bound to make or tender compensation before they entered upon the property; but the case shows that they entered on the premises and occupied them, not only without the permission of the complainants, but after refusal of such permission and against the warning of the complainants, given on the very day the defendants began their work. They cannot convert their wrong into an equity to protect them in persisting in the wrong. Assuming, then, for the purposes of this motion, that the tunnel company is a lawful corporation, duly organized under the general railroad law, and entitled to exercise the powers granted by that act, and that they may lawfully take, by condemnation, the land in question, and that the land is a public street, and that the board of aldermen could lawfully authorize them to occupy the street for purposes wholly foreign to, and incompatible with, the recognized uses of a street in a city, (on which point see *State v. Laverack*, 5 Vroom 201,) the defendants must, on the case made by the bill and answer, be enjoined from further prosecuting their work on the land until they shall have made compensation. This court is reluctant to interfere with the progress of public work, but it cannot fail to recognize and protect the constitutional rights of property.

The order to show cause will be made absolute, and an injunction issued accordingly.

Pierson v. Lum.

PIERSON vs. LUM and wife.

1. A contract entered into by a married woman for the sale of her estate will not be enforced.

2. But equity will charge such estate with the value of property delivered to her as the consideration of the contract, and with moneys expended by the vendee in the erection of a house on the land, and in otherwise improving it, with her knowledge and consent.

On final hearing on bill and proofs, taken under order to proceed *ex parte*.

Mr. R. S. Green, for complainant.

THE CHANCELLOR.

On the 20th of February, 1871, Jane C. Lum, wife of Lewis P. Lum, was the owner in fee of a lot of land in the city of Elizabeth. On that day an agreement in writing, purporting to be between her husband and the complainant, was executed by her and her husband, under their hands and seals, for the conveyance by her husband, by deed to be executed by him and her, of the lot above mentioned to the complainant, free from all encumbrances, for the consideration of a certain bay horse, harness and phaeton. The agreement also provided for the erection, by the husband for the complainant, of a building upon the property, according to a written agreement of the above date, made by and between them. The horse, harness and phaeton were duly delivered. The house was built on the premises by the husband for the complainant, under the last mentioned agreement. The price stipulated to be paid for it was \$3800. Of this amount the complainant paid, as appears by the receipts of the husband endorsed on the building contract, \$1300. For the rest of the \$3800 a mortgage of \$2500 was put upon the premises by Lum and his wife, the loan having been negotiated by the complainant,

Pierson v. Lum.

who was to take the premises subject to that encumbrance. The complainant, during the progress of the building, put in, at his own expense, stained glass in the parlor doors. He also, at his own expense, graded the lot and set out trees upon it, put down a stone well curb, and put lightning rods on the house, and after the house was completed he caused it to be cleaned. He took possession of the property after the house was finished, but Lum subsequently broke into it and got possession, and held it against the complainant. The defendants refused to convey the property to the complainant, and he files his bill for a specific performance of the contract to convey, or failing that, for a decree for satisfaction, by charge on the property of the money paid by him. The prayer for specific performance must be denied. Without referring to the defective character of the agreement in this case, it is enough, on this point, to say that equity will not decree the specific performance of a contract entered into by a married woman for the sale of her estate. *Wooden v. Morris and wife*, 2 *Green's Ch. R.* 65; *Pentz v. Simonson*, 2 *Beas.* 232. But the complainant should receive the value of the horse, harness and phaeton, and be repaid the money paid by him on account of the house and grounds. The evidence is that the wife consented to and joined in the contract for sale, which contained a reference to the agreement for building the house, and that she knew of the payments made by the complainant. The money paid by him on account of the house and grounds enhanced the value of her separate estate. In equity she is bound to repay it to the complainant, and to pay him the value of the horse, harness and phaeton, and under the circumstances equity will charge her separate property with the payments made by the complainant and the value of the property delivered by him as the consideration of the agreement to convey. *Pentz v. Simonson*, *supra*. There will, therefore, be a reference to a master to ascertain and report the amounts paid and the value of the horse, harness and phaeton. The complainant will not be allowed for his personal services in superintending the construction of the building.

Hewitt v. Montclair Railway Co.

HEWITT vs. THE MONTCLAIR RAILWAY COMPANY
and others.

1. An adjournment of a sale of real estate under a public statute, for an period not exceeding one week, need not be advertised in the newspapers. A formal adjournment of the sale from week to week is sufficient.

2. Application to set aside master's sale refused, no improper control of complainant's solicitor over the adjournments, nor any surprise upon the petitioner, appearing; nor that any greater price could be obtained upon a re-sale, or that a re-sale could in any way benefit the petitioner.

On order to show cause why master's sale should not be set aside. On petition and affidavits.

Mr. John Linn, for petitioner, William A. Guest.

Mr. Cortlandt Parker, for purchaser.

THE CHANCELLOR.

Under the *fiery facias* for sale of the mortgaged premises in this cause, the master to whom the execution was directed, sold the premises at public auction on the 18th of December, 1874, to the complainant, the highest bidder, for \$3000. The amount due the complainant, who was the holder of the second mortgage, on the execution, was \$887,790, besides interest and costs. The property was sold subject to the first mortgage, which was for over \$2,000,000. It appears that the mortgaged premises are regarded as of far less value than the amount of the first mortgage. The petitioner, William A. Guest, was the owner of the property subject to the mortgages, he having bought it at a sale made by the receivers. He asks that the sale may be set aside on three grounds: *First*, that the adjournments were not legally advertised; *Second*, that they were not legally announced; and, *Third*, that the master, in adjourning the sale from time to time, acted by

Hewitt v. Montclair Railway Co.

direction of the complainant's solicitors. As to the first objection: it appears that on the day fixed for sale in the original advertisement, the sale was adjourned for four weeks and that that adjournment was duly advertised in the newspapers. The sale was then adjourned from week to week from that time till the day of sale, but the adjournments were not advertised. The petitioner insists that each of these adjournments should, according to law, have been advertised in the newspapers, arguing that the legislature intended that if a sale be adjourned for over one week beyond the day fixed for sale in the original advertisement, all subsequent adjournments, for whatever period, must be advertised in the newspapers. The language of the act (*Nix. Dig.* 866, § 67,) on this point is: "and if said sale shall be adjourned for more than one week, said adjournments shall be published in said two newspapers," &c. The meaning clearly is, that if any adjournment be for a longer period than one week, notice of it shall be published in the newspapers, and by necessary implication, any adjournment for a period not to exceed one week need not be so advertised. The legislature did not deem it necessary to require advertisement in the newspapers on adjournments from day to day, or for a period of a very few days merely, so that it did not exceed a week. Of such adjournments, those interested in the sale or desiring to purchase at it would not require a reminder. It is enough to say that the legislature has not provided that adjournments which do not exceed one week shall be advertised in the newspapers.

The second objection is that the adjournments were not legally announced. I do not deem it necessary to refer to the testimony of the master on this head. I do not perceive that he was in any wise remiss in his duty in this particular, or that the requirements of the law in this respect, were not fully complied with. Nor do I find in the testimony above alluded to, which is all the evidence which has been produced on the subject of the conduct of the sale, any ground for setting aside the sale because of any improper control by the complainant's solicitors over the adjournments.

Chapman v. Chapman.

It appears from the testimony, that there was no surprise upon the petitioner, for there was an arrangement between his solicitor and the master, for the convenience of the petitioner and his solicitor to relieve them from the necessity of repeated attendances, that the master should inform one of them when the sale would take place, and that he accordingly notified the solicitor on the 9th of December, that the sale might take place on the 11th of that month. The petitioner's solicitor attended accordingly on the last mentioned day, when the sale was adjourned to the 18th of December, and on that day he attended and bid on the property. It is not alleged that any greater price could be obtained for the property on a re-sale, or that a re-sale could in any way benefit the petitioner. I am unable to see any ground for granting the prayer of the petition. The order to show cause will, therefore, be discharged, and the petition be dismissed, with costs.

CHAPMAN vs. CHAPMAN.

1. It is the duty of a wife who sues for a divorce, to cease cohabitation with her husband until the termination of the suit.

2. Where a wife files her bill for divorce on the ground of adultery, the husband will not, because the wife claims to be the owner of the house in which they dwell, be compelled to leave it until it shall be determined by the result of the litigation whether the charges against him are well founded or not.

On petition and affidavits, and answer.

Mr. C. H. Winfield, for petitioner.

Mr. J. Flemming, for defendant.

THE CHANCELLOR.

The complainant has filed her bill in this suit for a divorce *a vinculo*, on the ground of adultery. The defendant has answered, and each of the parties has taken testimony. The

Chapman v. Chapman.

complainant now files her petition in the cause, praying that the defendant may be restrained from entering into or remaining in the house in which they reside, in Jersey City, from this time forward till the termination of the suit, and from annoying, disgusting or disturbing her therein. The petition complains of the defendant's conduct in the house. There was no application for alimony in the cause. It appears from the answer to the petition, that the complainant is in receipt of an income of \$2000 a year from her separate estate. Each of the parties claims to be the owner of the house. The complainant admits that the defendant is owner of part of the furniture in the house. The complainant, having filed a bill of divorce from her husband on the ground of adultery, was not only at liberty to cease cohabitation with him until the termination of the suit, but it was her duty to do so. *Marsh v. Marsh*, 1 *McCarter* 316; *Sullivan v. Sullivan*, 2 *Addams* 199; 2 *Bishop on Marriage and Divorce*, § 384. "When a suit is pending," says Bishop, "for divorce from bed and board, or from the bond of matrimony, or for declaring a marriage duly solemnized void from the beginning, it is equally improper for the parties to live in matrimonial cohabitation, whatever is to be the result of the suit. Even if the husband offers to support the wife in his own house, with separate beds, she should not accept the offer. Therefore the single fact that the suit is pending, is alone sufficient to entitle the wife, who has no adequate means of her own, whether plaintiff or defendant, to alimony during its pendency." Says Chancellor Green on this subject, in *Marsh v. Marsh*, "A regard to public decency, as well as the settled usage of the court, requires that under such circumstances the parties should not live together." The wife, in this case, is under no hard necessity to continue her cohabitation with her husband, especially in view of her pecuniary independence of him. But she claims that inasmuch as she is the owner of the house, and of a considerable part of the furniture therein, she ought not to be required to leave her property, but on the other hand her husband should be required to leave the house. In sup-

Chapman v. Chapman.

port of this claim much stress was laid, in the argument, on the fact that, according to the construction put upon the act of 1870 by the petitioner's counsel, the wife, in such a suit as this, is not a competent witness to prove anything but her marriage to the defendant, and that, therefore, if the defendant should apply for permission to amend his answer, to set up condonation as a defence, and the permission should be accorded, she would be unable to meet the charge by her own testimony. But she may escape all liability to this apprehended difficulty and all annoyance from her husband by removing from the house. Should she do so, the court would protect her rights of property. In this case the husband is already under the injunction of this court in another suit, brought by the wife against him, restraining him from disposing of that part of the furniture in the house which is claimed by her as her separate property. Moreover, the parties in this case, though living under the same roof, occupy separate apartments. Their relations are apparently hostile. Each complains of the animosity of the other. There appears to be no lack of witnesses in the house, and they do not seem to be unfriendly to the petitioner. The defendant, if the construction of the act of 1870, above mentioned, be conceded, will be, equally with her, disqualified from testifying in the cause as to anything except the marriage. There would seem to be no substantial ground for the apprehension on which this application is based. The question here is, whether this court will exclude the defendant from the house in which he and his wife reside with their family, and where as yet he has a right to dwell, merely because his wife has filed her bill for divorce on the ground of adultery. To do so would, to say the least of it, be to prejudge him. Certainly, the proposition that a husband against whom his wife files a bill for divorce on the ground of adultery, is, in case she claims to be the owner of the house in which they dwell, to be banished from his home until it shall have been determined by the result of the litigation whether his wife's charges are well or

Ward's Executors v. Hague.

ill-founded, is novel and extraordinary. It cannot be maintained. The prayer of the petition is denied, and the petition dismissed.

WARD'S EXECUTORS vs. HAGUE and others.

1. The equity which entitles a subsequent mortgage encumbrancer to the benefit of a release executed by a first mortgagee, arises only when the first mortgagee gives the release with knowledge of the existence of the subsequent mortgage; and if the release is executed without notice of existing equities on the part of the subsequent encumbrancer, the first mortgagee is not responsible for the consequences of his act, nor is the lien of his mortgage in any wise impaired. The recording of the subsequent mortgage will not operate as constructive notice of its existence to the prior mortgagee.

2. To entitle the holder of a judgment on a lien claim upon a building erected upon premises covered by a mortgage, to the benefit of a release, made after the commencement of the building, of other land embraced in the mortgage, the mortgagee must have had knowledge at the time he executed the release, of the existence of the claim, and have acted in bad faith and with unjust intention. The mere fact that when the release was made the building was in progress, and the mortgagee knew it, is not sufficient.

Motion to open decree *pro confesso* and let in defendants to answer.

Mr. Frederick Adams, for the motion.

Mr. Oscar Keene, contra.

THE CHANCELLOR.

This case comes before me on an application on behalf of certain of the defendants, to set aside the decree *pro confesso* and order of reference, and admit them to answer, to the end that they may set up an equity against the complainant. The applicants are holders of a judgment on a mechanic's lien

Ward's Executors v. Hague.

claim for work and material done and provided in and for the building of houses for the mortgagor on the mortgaged premises. The equity they claim is based on the fact that the complainant's testator, then the holder of the mortgage on which the bill is filed and which was the first encumbrance on the premises, released certain other land included therein, after the commencement of those buildings. The applicants aver that the release impaired and rendered insufficient the security of the persons who either had done or furnished, or might do or furnish, work or materials on or for the buildings, and they insist that they are therefore entitled in equity, to the benefit of the release. It is not alleged that the testator knew or had any reason to suspect the existence of any claims whatever, which might be or become liens upon the mortgaged premises, or any part thereof, when he executed the release, or that he was aware that he was in any wise affecting, by the release, any interest of any creditor of the mortgagor. The release appears to have been made at the request of the mortgagor and for his accommodation, and without any consideration. This application is rested on the ground that the buildings, which were partly constructed when the release was executed, were, of themselves, notice to the testator of the equities of the lien claimants. The buildings were commenced after the mortgage was given, and the mortgagee knew that such was the fact. He was induced, by the increased value which they gave to part of the premises, to release the rest. The equity which entitles a subsequent mortgage encumbrancer to the benefit of a release executed by a first mortgagee, arises only where the first mortgagee gives the release with knowledge of the existence of the subsequent mortgage; and if the release is executed without notice of existing equities on the part of the subsequent encumbrancer, the first mortgagee is not responsible for the consequences of his act, nor is the lien of his mortgage in any wise impaired. The recording of the subsequent mortgage will not operate as constructive notice of its existence to the prior mortgagee. *Blair v. Ward*, 2 Stockt. 126; *Van Orden v. Johnson*, 1

Louderbough v. Weart.

McCarter 376 ; *Hoy v. Bramhall*, 4 C. E. Green 563. The circumstances under which the release was made in this case, do not appear. Nor does it appear what representations were made to the testator in reference to the existence of any claims, the holders of which might be affected by the execution of the release. The case made on this application is admitted to be all that could be made against the complainant if this motion were granted. Whether the lien claimant in such a case as this would be entitled to the equity which is set up here, must depend on something more than the mere fact that when the release was made, the building was in progress and the mortgagee knew it. Chancellor Kent, speaking on the subject of the equity under consideration, says : “ As this rule of substitution rests on the basis of mere equity and benevolence, the creditor who has thus disabled himself from making it is not to be injured thereby, provided he acted without knowledge of the other’s rights and with good faith and just intention, which is all that equity in such case requires.” *Cheesebrough v. Millard*, 1 Johns. Ch. 414. On the evidence before me, I should be unwilling to hold that the testator had knowledge of the rights of the applicants or those under whom they claim when he released, and it is not denied that he acted in good faith and with just intention.

The motion will be denied, with costs.

LOUDERBOUGH vs. WEART.

1. The words in the will used to dispose of certain personal property, held to constitute a *specific* bequest.

2. When express directions are given in a will to sell land and no person is named to make the sale, the power of sale is held by implication to be in the executors, in cases where it is their duty to distribute or pay out the proceeds.

Louderbough v. Weart.



Mr. McGee, for complainant.

Mr. J. B. Vredenburgh and *Mr. Weart*, for defendant.

THE VICE-CHANCELLOR.

The two questions for solution in this suit by executors for the construction of the will of John McEldery, deceased, arise out of that portion of his will which is in the words following, to wit :

“After all my lawful debts are paid and discharged, I give and bequeath to my beloved sister, Anna McEldery, of Philadelphia, my personal property, consisting of three-quarters of steamer Chief, three-quarters of steamer Oyster Bay, seven-eighths of steamer Helen Brown. It is my request that this property be sold as soon as possible and to the best advantage, and the amount accruing from sale I want invested in reliable securities, and two-thirds of the accruing interest to be held as cash and reinvested with the original amount. I also bequeath to her my lots in Bergen, they to be sold at the best advantage, and payments thereon to me, made as short as possible, to settle up estate.”

The executors proved the will in Hudson county, in September, 1872, and made sale of the steamboat property above bequeathed, for \$21,150, which sum is not disputed to have been a fair and reasonable price. The first of the two questions to be decided in this suit, relates to this money, and is the question whether the executors are entitled to hold and manage the money, or whether it should be held and managed by the defendant, who is the lawful guardian, in this state, of Anna McEldery, the sister, a lunatic, residing in Philadelphia. The second of the two questions relates to the Bergen lots, and is whether or not the executors have power to sell them.

The whole will is very unskillfully drawn. The draftsman evidently failed clearly to see or to express the testator's intent, and the difficulties in the way of construing the will with confidence, justify recourse to this court for instructions.

Louderbough v. Weart.

I am of opinion that the words disposing of the steamboat property, constitute a specific bequest. The sale by the executors having been for an adequate price, and being assented to by the guardian so far as to render it valid, the only consequence now resulting from the specific character of the bequest is, that the defendant, representing Anna McEldery, to whom the bequest was made, is entitled to take the money, as he was entitled to claim the interests in the boats before the interests were sold. I do not see any room to question the specific character of the bequest, and when by virtue of it, the proceeds of the property are brought into the hands of the guardian, the difficulty growing out of the imperfect directions of the above portion of the will as to what shall be done with these proceeds, does not seem to me a serious one. If Anna McEldery should become of sound mind, she would be entitled, I think, to take the principal fund, and the imperfect or incomplete directions as to the interest accruing on it, could not impair or qualify her absolute power of disposal of the whole. These directions do not raise, in my judgment, the point of perpetuities, as was suggested at the argument. I regard them as of no legal efficacy to interfere with the absolute ownership of the property bequeathed to her. The guardian would be entitled to use for her benefit, whatever might be necessary or proper. The provisions made for her by other parts of the will, are such that the guardian will probably not be called on to expend more than one-third of the accruing interest on the fund in question. The other two-thirds he may invest, and in this way the original fund, with the accumulations, may be held till her restoration to mental soundness, or till her death, when the whole will belong to her lawful heirs. This state of things would exclude any practical necessity for construing the directions referred to, but if more than one-third of the interest should be needed for her support, I have no doubt that the guardian would be entitled to use it. The directions are so incomplete and uncertain, that no restrictions or limitations can be inferred from them in contravention of the

Jacques v. Ennis.

absolute bequest of the property from which the interest is to arise.

In respect to the second question, namely, by whom are the lands to be sold? I am of opinion that inasmuch as the proceeds of the sale appear by the words of the will to be made payable to his estate or to his representatives, and to be used or applied in the settlement of his estate, a power arises by implication to the executors to make the sale; and if the proceeds can then lawfully be paid over to the devisee, consistently with the conditions of the estate towards creditors or legatees, then to pay such proceeds to the sister Anna, or her guardian.

When express directions are given to sell, and no person is named to make the sale, the power of sale is held to be in the executors by implication, in cases where it is their duty to distribute or pay out the proceeds. *Seeger's Executors v. Seeger*, 6 C. E. Green 90; *Williams on Executors*, Vol. 1, 579.

JACQUES and wife vs. ENNIS.

1. Where lands, subject to curtesy, are sold by commissioners in such manner as to pass title free of the curtesy, the interest of the proceeds will belong to the tenant by curtesy, during life.

2. The lands in this case held not to have been sold free of curtesy but subject to it, because the order of the Orphans Court directing the sale was made without the tenant by the curtesy having been made a party to the proceedings, and without any adjudication whatever, respecting his estate.

Mr. Dixon, for complainants.

Mr. Shafer, for defendant.

THE VICE-CHANCELLOR.

Washington I. Jaques and Mary his wife, have filed the bill in this suit against Thomas W. Ennis, the father of Mary, for an account of the proceeds of sale of certain real estate in

Jacques v. Ennis.

the county of Union, belonging to her, and sold by commissioners in partition, who paid over the proceeds to said Ennis, her guardian. At the time of the sale she was seized of an undivided third part, subject to her father's right therein as tenant by the curtesy. The question for decision is whether the father is entitled to the interest, during his life, arising from the moneys so paid to him by the commissioners; and to decide this question it is necessary to determine whether the moneys so paid are the proceeds of a sale of her estate in the land, together with her father's, or of her estate alone—in other words, whether the premises were sold subject to or discharged of his curtesy.

The wife of Ennis and mother of Mary, died seized of the undivided estate, in 1853, when Mary was an infant. As tenant by curtesy the father took the rents and proceeds till the sale, in 1858. In May, 1858, he was appointed by the Union county Orphans Court guardian of Mary, and in the proceedings in that court afterwards begun, by one of the three tenants in common, for partition of the whole tract, the statutory notice to be given to Mary was served on him as her guardian, but he was not made a party to the proceedings, nor was his estate by the curtesy admitted or adverted to. The whole tract was bought in at the commissioners' sale by Ennis and the petitioner, who instituted the partition proceedings.

There can be no dispute that where lands, situated like those now in question, are sold so as to pass title free of the curtesy, the interest of the proceeds will belong to the tenant by curtesy, during life. This proposition is established or recognized by the authorities cited for the defendant, viz.: *Ellsworth v. Cook*, 8 *Paige* 643; *Dunscomb v. Dunscomb*, 1 *Johns. Ch.* 508; *Follett v. Tyrer*, 14 *Simons* 125. But in this case the estate by curtesy does not appear to have been sold. The act supplemental to the act respecting partition, which was approved February 12th, 1855, (*Nix. Dig.*, 4th ed., 672,) provides that where the sale of premises subject to dower or curtesy shall be ordered, the owner of such

Albert v. Burbank.

estate having been made a party to the proceedings, and the estate having been adjudged to be sold, the estate shall pass by the sale, and the purchaser shall hold the premises free and discharged thereof. The owner here was not made a party, and no adjudication whatever was made respecting his estate. Had the premises been directed to be sold together with the curtesy, they would doubtless have commanded a higher price at the sale. If there was any belief on the part of bidders that the premises were to be sold subject to curtesy, or any doubt in regard to it, it would plainly be wrong for the defendant to take advantage of a purchase at a lower price, caused by a belief or doubt occasioned by his own conduct or default.

There should be a decree that the defendant account, according to the prayer of the bill.

ALBERT vs. BURBANK.

A deed of conveyance of lands having been delivered to the complainant by the defendant, and afterwards, before it was recorded, having been entrusted to the defendant for the purpose of having certain informalities in the deed corrected, the defendant refused to return it—*held*, that he should be decreed to execute the trust reposed in him, by restoring the deed, or, if destroyed by him, to give another good and sufficient conveyance for the premises.

Mr. G. Ackerson and Mr. Knapp, for complainant.

Mr. L. Zabriskie, for defendant.

THE VICE-CHANCELLOR.

The bill alleges that the defendants, Burbank and wife, by their deed of March 26th, 1870, duly executed, acknowledged and delivered, did convey to Ellen Albert, wife of Fanning P. Albert, ten acres, or thereabouts, of land, in the county of Ber-

Albert v. Burbank.

gen ; that the consideration was the sum of \$5000, of which the sum of \$2000 was paid in cash, and the remaining \$3000 to be paid in one year, with interest ; that, after the delivery of said deed of conveyance, said Albert discovered that the same, instead of reciting the name of the grantor, George M. Burbank, in full, recited it by the initials G. M. Burbank, and also that said deed contained several other minor informalities ; that Burbank, a few days after the delivery of said deed, being shown said informalities by said Albert, and being requested by him to have the same corrected, took said deed for that purpose, promising to have them corrected, and return the deed to the grantee ; that, having so obtained possession of the deed, Burbank afterwards refused, and has since continued to refuse, to return the same. The bill prays that he may be decreed to deliver up to the complainants the deed so given to him for correction, or, in case the deed cannot be produced by him, that another deed be decreed to be executed and delivered in place of the original one.

The defence is, *first*, that the deed was not delivered, as alleged in the bill, but was only committed to the custody of Albert for a special purpose pending the negotiations ; and, *second*, that the case, as shown by the bill, is not one for relief in this court.

The evidence in the cause is considerably voluminous, and I shall say no more in respect to it, than that it establishes, in my judgment, the substantial allegations of the bill. In point of fact, I think the deed was delivered, and that the title to the land became vested in Albert, charged with the payment of the \$3000, balance of the stipulated price. This balance, with interest, is due and unpaid.

The second point of defence was strenuously urged, but it cannot prevail. I think the case made by the bill is a plain case of trust. This view of it was resisted by the counsel of the defendant ; but the authorities cited by him in respect to the specific enforcement of agreements for the sale or transfer of chattels apply to difficulties which this case of trust is not

 Bowlby v. Bowlby.

embarrassed with. It is not important, as matter of pleading that the fiduciary relation should be averred in a set form of words. The facts are averred, from which the fiduciary relation sufficiently appears. The special peculiar value of the deed to the complainant is obvious. It might not be indispensable in maintaining legal title, but it is the best and the appropriate evidence of it. There is no difficulty, so far as I am able to perceive, in decreeing the restoration of the deed on the elementary principles of trusts, which this court is the appropriate tribunal to enforce. That the defendant has destroyed the deed, cannot destroy the trust, or avail him as a defence. He can supply another good and sufficient conveyance of the premises to Ellen Albert, and this he must be decreed to do, upon payment or tender to him of the remaining part of the purchase money, with interest from the date of the stipulated mortgage.

I shall advise as above.

 BOWLBY vs. BOWLBY.

1. A separation from her husband by the wife for more than three years, though begun by her without such reasons as would have sufficed on her part to procure a divorce from him, *held* not to entitle him to a divorce, because of his neglect to do anything to induce her to return.

2. The desertion, though willfully begun, *held* not to have been obstinately continued, but to have been in fact made compulsory against her by the conduct of her husband.

Mr. Leonard and *Mr. McCarter*, for complainant.

Mr. Taylor, for defendant.

THE VICE-CHANCELLOR.

I must advise in this case, that the complainant's bill be dismissed, with costs. He sues for a divorce from his wife on the ground of desertion. A separation has existed between

Bowlby v. Bowlby.

them since the month of March, 1867. She left in that month the house of his parents, where he lived, but it is clear from the evidence, that the continuance of the separation then begun is chargeable to him more than to her. Whether the beginning of the separation was not by his consent and by his aid, is a question in respect to which the evidence is conflicting. She swears that it was, and he swears that it was not. They were both examined as witnesses before me, and, after hearing and considering their testimony in connection with the other evidence, I am quite unable to say that his testimony is entitled to more weight than hers. But the relative weight or credibility of their testimony on this point may be allowed to go undeclared, because I cannot doubt that, assuming the separation to have been begun without his express consent, and without such legal reasons for it as would have enabled her to obtain a decree of divorce against him, yet his subsequent conduct shows that he concurred in the separation, and did, in fact, make it compulsory against her. His omission to do anything whatever to invite or encourage or permit her to return, was manifestly due to his purpose to have her absence become a cause for divorce. All the circumstances point to this conclusion ; not the least of which is the fact that a few weeks after she left him she went back, under the pressure of poverty and the wants of her child, as well as her own, to the complainant's home at his father's, and sought admittance in vain. He was not there, but his mother met her at the door, and his mother's conduct and words were, in effect, a refusal to give her admission, and the fact that this attempt of his wife to return to him became known to him that evening, or shortly after, and his practical approval and adoption of his mother's refusal, by acquiescing in it, must prevent him, aside from other features of the case, from successfully maintaining that her absence has been on her part a desertion. Whether it has been a desertion on his part need not now be considered. This view of the case is the most favorable to the complainant that the evidence ad-

Bowlby v. Bowlby.

mits of, and I adopt it in advising the decree mentioned above.

The parties were married in New York, in February, 1861. He was attending lectures as a student of medicine, and boarding in the family of a widow, who had adopted the defendant when an orphan of five or six years. The defendant was a member of the family at her marriage, and about sixteen years old. The complainant's age does not appear from the testimony, but is manifestly much greater than his wife's. The marriage was private and not disclosed to their friends till weeks afterwards, when he took her to his father's, in Newark, in whose house she remained, with the exception of a few months, till the time of the separation in 1867. Her situation of dependence was not agreeable to her feelings, and, while no contentions or differences of importance appear to have arisen between her mother-in-law and herself, it is plain that their association did not conduce to the happiness of either. The mother testifies to the defendant's temper that it was variable and capricious, but no serious misconduct is alleged, nor does the defendant allege any against the mother. There was a lack of sympathy between them, and a lack of complacency in the mother with her son's marriage. The suggestion occurs in the case that the defendant was a servant at the time of her marriage, but if true it could hardly add anything to the merits of his case, and it does not appear to be true. So far as inferences can be drawn from the defendant's testimony and demeanor as a witness, there is no disparity between the parties unfavorable to her, in respect to either intelligence or culture, nor anything to indicate an inequality of social positions. In 1862, the complainant joined the army as an assistant surgeon, and was in it at the close of the war. After his return he was infected with the venereal disorder, which he communicated to his wife and child, and which she testifies was one of the reasons of the separation. Much of the testimony on his side relates to this disorder, and is to prove that the existence of it in himself was not due to his criminal conduct. The presumptions and proofs are adverse

Bowlby v. Bowlby.

to him on this point, but he swears to his innocence in positive terms, and I accept his testimony in regard to it as true. But accepting it as true, and admitting the allegations of the answer against him not to be established by the proofs, the case is yet clearly against him. The sickening calamity thus brought on his wife entitled her to consideration from the complainant, widely different from that which he seems to have conceived to be her due. She was not cured, she says, till several months after she had left him. He says she was cured when she left. But whatever her true state then was, it is certain that her nerves were unsettled and her constitution affected by a loathsome disease, communicated by him. It need not be said that he was bound to exercise corresponding forbearance, not to say kindness, in his care and protection of her. He was bound, under all the circumstances of her leaving, to look after her, and not abandon her to the consequences of her mistake, if mistake she committed. The evidence, showing these circumstances in detail, need not be presented in this opinion. My judgment is that there is an entire failure to make out what the statute describes as a willful, continued and obstinate desertion. Willful in the first instance, it may be conceded to have been, under the favorable view I assume for the complainant. Obstinate it was not, because not persisted in against effort or influence on his part to bring it to an end. On the contrary, he repelled her advances. His excuse is that she had complained to her friends after leaving him of the disease she had taken from him, and had charged him with cruelty and the offences alleged in her answer. But he did nothing, when he found her gone, to bring her back before these complaints could be made, and he had given too much occasion for them to justify this excuse, or make it available in his defence.

The charges of cruelty and adultery, contained in the answer, may, as before stated, be admitted not to be established by the proofs. Desertion or separation by the wife may be excused on grounds short of those which would be sufficient, on her side, to obtain a divorce. In *Cornish v. Cornish*, 8

Johnson v. Jaqui.

C. E. Green 208, it was held that where the husband has not made the advances or concessions which a just man ought to make to put an end to his wife's desertion, induced, though not justified, by his conduct to her, the desertion, though willful and continued, is not obstinate. This rule is in accordance with previous decisions in this court, by the late Chancellor and his predecessors, and, applied to this case, disposes of it against the complainant, and makes it unnecessary to discuss or decide other controverted points presented by the pleadings and proofs.

JOHNSON vs. JAQUI.

1. Where the words of the grant are clear and unequivocal, there is no room for the application of the principle that the grant must be construed most strongly against the grantor.

2. The conveyance in this case gave the right to take the water from an upper to a lower pond—*held*, that no right could be inferred to take the water from the upper pond to a wheel below the lower pond. The parties must be confined to the plainly expressed agreement in the deed.

Mr. Pitney, for complainant.

Mr. Vanatta and *Mr. J. Cutler*, for defendant.

THE VICE-CHANCELLOR.

Whether the injunction issued in this case upon the filing of the bill, shall now, after final hearing upon the pleadings and proofs, be dissolved or made perpetual, depends very little, if at all, upon the testimony offered at the hearing, but must be decided by determining the true construction and effect of the grant contained in the defendant's deed. A brief statement will suffice to show the situation of things to

Johnson v. Jaqui.

which the grant relates, and the few facts necessary to be known in order to settle its nature and extent.

In January, 1864, Charles Johnson, the father of the complainant, was the owner of two tracts of land in the county of Morris, on each of which, were a mill-pond, mill and appurtenances. The tracts were separated from each other by a public highway and differed considerably in their respective locations; that on which a grist mill and pond were located, being much lower than the tract whereon were a saw mill, grist mill and pond. The difference between the ordinary levels of the two ponds, was from nine to ten feet. The water of the upper, or saw mill pond, was not used exclusively for the saw mill or cider mill, but to some extent was used to add to the water of the lower pond on the opposite side of the road. The water was carried from the upper to the lower pond through a wooden feeder or trunk, not more than a foot square, extending several hundred feet in a circuitous course, placed partly on piers, partly on the surface of the ground, and partly under it; running first across the westward lot of Johnson to the highway or near it, then along the highway, and then under it, and emptying into the pond of the grist mill.

In this situation of things, Charles Johnson, by deed of January 18th, 1864, conveyed to Jaqui and Nehemiah H. Johnson, the grist mill lot, containing an acre and a-quarter of land, to the description of which were added the words of the grant now in controversy, as follows: "And also to include the pond, dam, tail-race and all the privileges heretofore had and used in connection with and for the purposes of the said grist mill. Also, to have the water from the old saw mill pond of said Charles Johnson, in rear of his dwelling, now carried in the trunk or feeder that carries the water from said pond to the grist mill pond above the dam, excepting only so much of said water as said Charles Johnson, his heirs or assigns, shall want for grinding apples at his cider mill near the old saw mill; and to have the privilege at all times, to enter upon all or any of the lands of said Charles

Johnson v. Jaqui.

Johnson, along and joining said trunk or feeder, to alter, repair or renew the same at their convenience."

By a subsequent deed from Nehemiah H. Johnson, Jaqui became the owner of the whole grist mill premises. By the will of his deceased father, the complainant became the owner of the mill property and land and dwellings on the opposite side of the road. The water continued to flow through the trunk or feeder several years after Jaqui's purchase, and then ceased, the trunk having fallen into decay and disuse.

After the trunk had so decayed and been partially removed, Jaqui began to construct, on the complainant's land, a new conduit or trunk by which to carry the water from the upper pond, not to the lower one as expressed in the deed, but directly down to the grist mill, to apply it there to the driving of a wheel fifteen or twenty feet lower than the level of the lower pond. This conduit was to be a cylindrical, hooped flume, two feet in diameter, crossing the complainant's premises to the highway in nearly, though not exactly, the same route or location with the former one, but unlike the former one, to be mainly under ground, and at some points, to the depth of several feet, for which the defendant began to make excavations. At that juncture, the injunction was issued.

It is clear in my judgment, that what the defendant proposes and what he contends he is entitled to do, is not authorized by the above recited deed, and is a threatened invasion of the complainant's rights, which the latter is entitled to have enjoined. By the true construction of the grant, the defendant may take the water from the upper pond to the lower, but not to any other place he may select. He proposes to carry it to a point distant from the pond, much lower than the level of the pond, and to apply it there, under the head which his proposed arrangement is intended to furnish. The complainant insists that the consequences of this arrangement will be greatly detrimental to him; that the sudden and rapid lowering of the water and the laying bare of the lands flowed by it, will be injurious to health and to the value and com-

Johnson v. Jaqui.

fort of his dwelling. The defendant denies that these consequences will follow, and insists that no loss or injury will result to the complainant. Witnesses were examined at the hearing, upon these points, but I am satisfied that their testimony cannot avail to affect the question to be decided. The inquiry is, what right over the water does the defendant take under the grant? Whether the right he now claims will impose a greater or less burden on the complainant than the right to carry the water to the pond, is an irrelevant inquiry. The place to which the water is to be taken is expressly stated in the grant. There is no ambiguity or uncertainty in the words, and no room for the application of the principle that the grant must be taken most strongly against the grantor. Because the water, after getting to the pond, can then be used to drive the wheel, is certainly no reason why it can be carried to the wheel in the first instance. This would be making for the parties by inference or reasoning an agreement different from that which their plain words express. It is of no avail to say that the proposed arrangement would be as advantageous to the complainant or more so than the former one. I do not think it would be so in fact, but if it were so proved, the answer is, it was not so agreed. So far, therefore, as the proposed work is being done to carry the water elsewhere than to the pond, the injunction prohibiting it, must be decreed to be perpetual.

There was discussion at the argument as to how far variations from the location of the old trunk or feeder, and from its position above the surface of the ground or under it, would be permissible in constructing another trunk, in view of the words of the deed empowering the defendant "to alter, repair and renew the same at his convenience." These words apply solely to a trunk leading from one pond to the other. Such a trunk does not appear to be intended by the defendant. He does not propose to construct it, and any controversies or difficulties that might arise as to the location of it, if attempted to be constructed, cannot now be determined or anticipated. The thing granted is the right to take the water to the lower

Vanmeter v. Borden.

pond. The terms by which the mode of doing it is described, may be regarded as admitting of some latitude of meaning. The mode of transfer will not be so treated or the words descriptive of the mode so strictly construed, as to defeat or impair the substance of the grant. The words descriptive of the mode will be construed most strongly against the grantor.

I will advise a decree for a perpetual injunction restraining the defendant from making any excavations on the complainant's land, and from doing on it any other acts in further prosecution of the proposed trunk or flume.

VANMETER v. BORDEN.

The writ of assistance refused, because the sale under the execution was not sufficiently advertised as to one of the tracts sold. The writ is discretionary, and will be granted only in clear cases.

Mr. M. P. Grey, for petitioner.

Mr. S. M. Dickinson, for respondent.

THE VICE-CHANCELLOR..

The petitioner is the purchaser, at sheriff's sale, of the mortgaged premises sold under execution in the above suit. This petition is for a writ of assistance.

This writ is a summary process only used when the right is clear, and when there is no equity, or appearance of equity in the defendant, and when the sale and proceedings under the decree are beyond suspicion. *Blauvelt v. Smith*, 7 C. E. Green 31. The exercise of the power rests in the sound discretion of the court. It will never be exercised in a case of doubt, nor under color of its exercise, will a question of legal title be tried or decided. *Schenck v. Conover*, 2 Beas. 220.

In the present case, I think the application should be re-

Vanmeter v. Borden.

fused. Two tracts were embraced in the mortgage and execution : one of about one hundred and fifty-eight acres, and one of about twenty acres. The first tract was described by metes and bounds, in the advertisement of sale, and the second was described as follows : " Also, twenty acres of land adjoining the above mentioned plantation, acquired by sundry purchases." There was nothing added to the words above quoted, to show the location or kind of land of the second tract, either in the advertisement or the sheriff's deed. The description of the first tract was also incorrect in one of the courses and distances. In addition to these objections, it was urged on behalf of the respondent, in opposition to the granting of the writ, that the defendant in execution had been misled in respect to the adjournment of the sale by the sheriff, or that an adjournment which had been promised, was afterwards refused. I do not think the objection made to the description of the larger tract a serious one, nor does it seem to me, from the evidence, that there was any want of fairness in the making of the sale without an adjournment. The description of the second tract is objectionable, if, indeed, it can be regarded as any description whatever. Possession has been demanded of both tracts, and the petitioner holds a deed for both. . The case is plainly one where the writ to put the petitioner in possession of both tracts ought not to issue. This being so, I am asked to advise that the petitioner be permitted to amend his petition so that it may be an application for the possession of the first tract only. I cannot so advise. The purchaser claims title to both tracts, and should be left to his legal remedy of ejectment for one as well as the other. There seems to me no sufficient cause to justify the separation of the transaction, giving relief in this court by summary process as to one part, and exposing the defendant to an action at law for the other. The legal questions growing out of the advertisement by the sheriff, can be settled in a court of law, to which, I think, the petitioner, under the circumstances, should be left for relief. The petition should be dismissed,

Fox v. Palmer.

without costs, for the reason, in respect to costs, that the petitioner's points, in support of which the costs were mainly incurred, were not supported.

FOX vs. PALMER and others.

1. A mortgage signed in blank and given to an agent, by whom it is afterwards filled in and delivered, is not a legally executed deed. The most that can be claimed for it is, that it may create an equitable lien, which this court may, under proper circumstances, enforce.

2. If admitted to be an equitable lien, it cannot prevail over equitable rights of another who has also the legal title.

Mr. Lippincott, for complainant.

Mr. Dixon, for defendants.

THE VICE-CHANCELLOR.

The mortgage sought to be foreclosed in this suit, was put upon record after the mortgaged premises had been conveyed by the mortgagor to his daughter, and the complainant seeks to enforce his mortgage lien on the ground that the daughter was not a *bona fide* purchaser for value without notice.

Joseph Palmer, the mortgagor, was, at the date of the mortgage, November 30th, 1870, the guardian of Ella L. Palmer, his daughter, then a minor between nineteen and twenty years old, and possessed of personal property, consisting of stocks, bonds and money in Savings Bank, amounting in all to something less than \$10,000. Her sister was the wife of Oscar F. Lund, and all of them resided in Jersey City. Lund was engaged in various transactions with William E. Rogers, a practicing lawyer, in Jersey City, with whom he was operating in different ways that involved the raising or borrowing of money. Through the agency of

Fox v. Palmer.

Rogers and Lund, the premises in controversy, being real estate in Jersey City, were bought and conveyed to Palmer. They were conveyed to Palmer by Edward Dunn, for about \$4000, in or about October, 1870.

The mortgage in question was signed by Palmer, in blank, and taken by Lund to Rogers. No bond is produced, but I think it sufficiently appears from the evidence, that Palmer signed a blank bond, together with the mortgage. The blank bond and mortgage were filled in with amounts and dates by Rogers, or under his direction, and were taken by Rogers and Lund to John M. Fox, the complainant, then a broker in New York, who procured, he says, from Frank W. Harris, an operator in New York, to whom the bond and mortgage are drawn, the sum named in them, to wit, \$3250, and paid it over to Rogers and Lund, less his charges and fees. The bond and mortgage were afterwards assigned to Fox, who relied upon Rogers, as his attorney, to have the mortgage recorded. Rogers neglected or omitted to have it recorded till May 25th, 1871.

While the negotiations for the purchase of the property from Dunn were going on, and payments being made for it, the securities of Ella L. Palmer were made use of by her guardian, together with Lund, for the raising of money ; and in April, 1871, Ella being aware of the fact, and anxious to be paid or secured, took a conveyance of the premises from her father, which was recorded on the 13th of May, 1871.

The particulars of the foregoing transactions thus generally stated, have been testified to in whole or in part by Ella, her father, Fox, Harris, Lund and Rogers. It is difficult to say with confidence, in view of the looseness and inaccuracy of much of the testimony and the contradictory statements of the witnesses, what the true particulars are. My conclusion upon the whole case is, that the conveyance to Ella should be sustained, and the complainant's bill dismissed, but without costs. I think it cannot be doubted that the mortgage signed in blank by Palmer and afterwards filled in by Rogers, was not a valid legal deed. The most that can be claimed for it

 Homeopathic Mutual Life Insurance Co. v. Crane.

is, that it is an equitable lien on the premises, which this court can, under proper circumstances, enforce. But if admitted to be an equitable lien, it cannot prevail against the equitable rights of Ella, who has also, the title by law. I think it altogether probable, if indeed the evidence does not prove, that the premises were purchased with the proceeds of her securities. There is some indefiniteness as to amount, but I think there can be little doubt that the full amount paid for the property, was in fact, hers. It is proved that she had no notice of the mortgage. There is nothing, so far as I am able to see after carefully examining the evidence, which would justify me in saying that her legal title is fraudulent, or that her deed should be decreed to be a security in the nature of a mortgage, either subsequent or prior to the mortgage of the complainant.

I shall, therefore, advise that the bill be dismissed. In view of the conduct of Palmer, enabling this mortgage to be made use of to raise money, I think it a case where costs should be denied for his answer, and also, generally, as against the complainant.

THE HOMEOPATHIC MUTUAL LIFE INSURANCE COMPANY vs. CRANE and others.

1. The facts as proved, held not sufficient to support the defence of usury. but, if sufficient, held not to be stated with sufficient certainty in the answer.

2. Where a policy of life insurance is issued in good faith, at fair or customary rates, as part of an operation wherein a loan to the policy holder is the other part, the legality of the loan cannot be questioned, though was dependent on the taking out of the policy. The transaction must be judged by the criterion of good or bad faith.

3. The bargain will not be held to be usurious because suspicious circumstances attach to it, nor because such bargains are susceptible of being made a mere cloak to cover usury. That the policy was taken out

Homeopathic Mutual Life Insurance Co. v. Crane.

cloak or device to evade the statute, must be established by cogent proof, direct or inferential.

4. The facts and circumstances of the usurious bargain must be particularly set forth in the answer.

Mr. T. D. Hodges and *Mr. Wm. H. Armour*, for complainants.

Mr. Cross and *Mr. Magie*, for defendants.

THE VICE-CHANCELLOR.

Part of the sum secured by the mortgage in this suit, was the first premium of an insurance policy issued by the complainants at the making of the mortgage loan, and upon the facts constituting this part of the transaction, the defence of usury is sought to be maintained. I think there are two reasons, one substantial and one technical, why payment of the mortgage cannot thus be avoided. *First*, the facts and circumstances, as disclosed by the proofs, do not support the defence; and, *second*, if the facts and circumstances so disclosed, are sufficient to support it, they are not stated with sufficient certainty in the answer.

The mortgage is for \$11,000, dated August 1st, 1872, and made by John R. Crane and wife to the complainants, a life insurance company of New York. The mortgagor resided in Elizabeth, in this state, where the mortgaged lands lie; and in or about July, 1872, through his son, James P. Crane, then a law clerk in New York, applied to the complainants for a loan. The son negotiated with the officers of the company, and the loan was agreed to, provided the son became a policy holder. The policy on his life was for \$8800. It was payable five years after date, if he should then be alive, or at his death, if he should die before the five years expired. The premium, payable every six months, was \$1004.69. This premium was not unusual or excessive in amount. It was, and is, very nearly, if not exactly, the premium usually charged by companies for this well known description of policies. Upon this point there is no room for doubt. On

Homeopathic Mutual Life Insurance Co. v. Crane.

behalf of the complainants, the contention is, that the company had a right to prefer policy holders in making their loans; that such was their practice; that the son became a policy holder at his own suggestion and request, and in the policy received a full and fair equivalent for the sum of \$1004.69, which was paid by the father, who understood and approved the arrangement. On behalf of the defendant, it is insisted that the issuing of the policy was a mere device to obtain interest on the loan at a higher rate than seven per cent. per annum, and the testimony of the son goes strongly to establish it. But the testimony of the son is directly contradicted by several witnesses, officers of the company, who explicitly and positively deny material statements made by him as to what was said in the interviews when the transaction was discussed and agreed on. The weight of testimony is against the view which he gives of it. The defence of usury must be made out by cogent proof. It must be clearly and conclusively shown that more than the lawful rate of interest was intentionally reserved. The usury will not be permitted to escape the legal penalties against it under cover of a fictitious or pretended business operation, designed merely to be a cloak to disguise the truth and substance of the bargain. But that the operation was, in fact, a pretence, and not a reality, must be proved, either directly or by inference, so as to leave no reasonable misgivings in the mind of the judge who is called upon to declare it to have been so. It will not be so declared because suspicious circumstances attach to it, nor because operations of that character are susceptible of being used for this illegal and reprehensible purpose.

In the present case, the taking out of the policy was made a condition to the procurement of the loan. This circumstance is not denied by the complainants, but whatever criticism it may expose their business methods to, it can hardly be contended, by itself, to make the bargain a usurious one. The circumstance that the policy was dated back to the 8th of the preceding April, is objectionable, and is much relied on for the defendants. It was not delivered till the early part of

Homeopathic Mutual Life Insurance Co. v. Crane.

August, at the delivery of the mortgage, so that nearly four months had gone of the six, at the end of which the second premium would be due. This circumstance, however, would not necessarily be in the interest of, or to the advantage of, the company. It might, or might not be, a cloak to cover usury. Policies of life insurance, as the evidence in this case explicitly proves, are sometimes dated back in the interest of, and for the pecuniary advantage of, the insured. If the policy now in question had been continued by the insured, and not allowed to lapse, the antedating of it, so as to bring the premium down to the lower rate for a younger age, and so also as to save the interest for four months on the premium, would have been against the company and in favor of Crane. It was the latter's fault or choice that it has not been so continued. But if, on the other hand, the understanding or agreement, expressed or implied between the parties, was that the policy was not to be kept up, but was to lapse at the end of the first premium period, then the circumstance of the antedating was an appropriate part of the plan to take more than lawful interest. The evidence does not warrant the conclusion that it was so understood or agreed. I think this feature of the case is clearly open to suspicion, and is one not to be commended. But it is consistent with a fair and just bargain on the company's part, as well as with a usurious one. The testimony is explanatory of it, especially that of the expert, Mr. Fachler. The calculations made on the part of the defendants, with a view to show that the premium charged was excessive, are fallacious. They do not allow for dividends expected to arise yearly from the premiums, nor for the value of the indemnity against death, during the five years covered by the policy.

I am satisfied, upon a careful consideration of the evidence in this case, that usury is not proved by it. Where a policy is issued in good faith, at the fair and customary rates, as part of a general operation, wherein a loan to the policy holder is the other part, I see no reason to question the legality of the loan, even though it depends on the taking out of the

Homeopathic Mutual Life Insurance Co. v. Crane.

policy. It is a question of bona fides, and must be so dealt with. The expediency of it as a business transaction is one thing; the legality of it is another thing.

The second, and technical difficulty, in the way of this defence is, that it is not set forth with requisite legal certainty in the answer. The rule as to this, is expressed by Justice Depue, in the Court of Appeals, in *Taylor v. Morris*, 7 C.E. Green 612. "In setting up," he says, "a defence of usury in a suit in chancery, the defendant must, in his answer, as in a plea of usury in an action at law, set out the particular facts and circumstances of the supposed usurious agreement, that the court may see that the agreement was in violation of the statute." The authorities referred to in his opinion are to the same effect. In the present case, the particular facts and circumstances of the alleged usurious agreement are altogether omitted in the answer. No hint is given of them. The allegations of the answer do not, in the remotest way, suggest the facts and circumstances intended to be proved, and the complainants are in no way apprised by the answer, of the facts necessary to be met by them in resisting the defence. There is a variance between the allegations and the proofs. The answer avers that, "it was agreed that said complainants should reserve and take, and said complainants did reserve and take, for the said sum of \$11,000, loaned for one year, the sum of \$1004.69, as a bonus, besides and in addition to the sum of seven per cent. per annum, reserved and taken, as mentioned in the condition of said bond and mortgage, and and that said sum of \$1004.69 was actually reserved, taken and kept back by said complainants out of \$11,000, besides the said interest, and was so paid by said John R. Crane to said complainants, and that, by said laws of said state of New York (in which state, the answer avers, the contract was made,) such contract, and the said bond and mortgage given therefor, were, and are, wholly usurious and void, and of no effect or force." If the proofs corresponded with the allegations, the technical difficulty, as to the pleading, would be wanting. If \$1004.69 had been kept back and reserved, as

Clarke v. McGeihan.

the answer avers, and nothing given in return for it, the variance would not exist. But no such bargain was made. A marketable and valuable commodity was given in exchange for it. If a controversy can fairly exist upon the facts as disclosed by the evidence, it is a controversy not indicated by the answer. It is not fairly presented by the answer, and should, therefore, be excluded from the defence.

In this view of the case, it is unnecessary to decide whether the mortgage contract is amenable to the laws of New York, or to the laws of New Jersey.

CLARKE vs. McGEIHAN and others.

Lands which were conveyed by a husband to his wife about the time when he contracted debts for which a judgment was afterwards recovered against him—*held*, to be subject to the judgment, on the ground that the conveyance to the wife was in fraud of creditors.

Mr. J. B. Vredenburgh, for complainant.

Mr. C. H. Winfield, for defendants.

THE VICE-CHANCELLOR.

The complainant, as surviving partner, recovered a judgment in the Hudson Circuit on the 29th of May, 1873, against the defendant, Patrick McGeihan, for \$1090, damages, and \$59.75, costs of suit. An execution was duly issued and returned unsatisfied, no property being found whereon to levy. The defendant's wife, Sarah Jane McGeihan, who is also a defendant, became, on the 25th of March, 1871, the grantee of certain real estate in Hudson county, of which her husband had previously held the title. The defendant, her husband, and herself conveyed the lands by deed of the last named date, to one Jesse McLaughlin, who, on the same day, con-

Clarke v. McGeihan.

veyed them to the wife. There is no dispute that the transaction was simply to put the title in her. The allegation of the defendants is, that the lands had been purchased with the wife's money, and that though her husband appeared by the papers, to be the absolute owner of the lands, yet, in fact, he held them only as trustee for her. The bill is filed to subject the lands to the payment of the judgment, upon the ground that the conveyance to the wife was without adequate consideration, and designed to hinder and delay the complainant in the collection of his judgment, and therefore, fraudulent and void.

The complainant and two of his clerks or employees, were sworn and examined before me, on the one side, and the defendants, McGeihan and wife, on the other. I have no doubt from the proofs, that as against the complainant, the conveyance to the wife should be decreed to be fraudulent and void. The debts for which the judgment was recovered, were contracted partly before the conveyance and partly after it, and were for goods sold and delivered. The statements of the defendants, on their examination as witnesses, do not divest the conveyance of the manifest badges of fraud that attach to it. The whole appearance and all the circumstances of the transfer, made as it was, so near to the time when the debts were contracted, are of a very suspicious kind. I do not find the testimony of the defendants at all satisfactory, or of a kind to repel the presumption so created. Their testimony, on the contrary, has confirmed the impression and conviction which the several features of the transaction are fitted to produce. It is plain that her husband's money went largely into the purchase of the land, and the correctness of their account as to the accumulation of her moneys in his hands, is more than doubtful.

I consider the case a plain one of fraud, and shall advise a decree in accordance with the prayer of the bill.

Sharp's Administrators v. Cutler. Lanning v. Heath.

SHARP'S ADMINISTRATORS vs. CUTLER and wife.

In a suit to foreclose a lost mortgage, the mortgagor cannot resist payment of either principal or costs on the ground of a refusal to indemnify him.

Mr. G. W. Forsyth, for complainants.

Mr. A. W. Cutler, for defendants.

THE VICE-CHANCELLOR.

The bond and mortgage, made by the defendant to Elizabeth H. Sharp, were lost in her lifetime, and after her death the defendant was willing to pay the amount due to her administrators, provided a bond of indemnity was given to secure him against further liability or damage by the loss of the papers. The administrators declined to give any indemnity, but offered, through their solicitor, to give a release. In this suit to foreclose, the defendant relies upon their refusal to indemnify him.

This refusal on their part is not a good ground of defence, either as to principal, or costs of the suit. It was so ruled in *Tassaker v. Mackerley*, 1 Stockl. 440.

I will advise a decree accordingly.

LANNING and others vs. HEATH.

1. Leave given to amend injunction bill, after answer filed, without prejudice to the injunction or other orders made in the suit.

2. The answer not to be withdrawn, but left on file, and the suit to proceed upon the newly engrossed amended bill.

 Bogert v. City of Elizabeth.

The bill in this cause was filed to enforce the specific performance of a contract entered into between the defendant and complainants, for the purchase and exchange of certain real and personal estate, and for an injunction to restrain the defendant from selling, exchanging, or in any wise disposing of the property which he had agreed to transfer and convey to the complainants.

The defendant filed his answer. The complainants, alleging that the written contract, as set forth in the bill, did not express the real understanding and agreement of the parties, now move to amend their bill in this respect, so as to make the contract conform to that understanding.

Mr. J. Wilson and Mr. Richey, for the motion.

Mr. W. D. Holt and Mr. Gummere, contra.

THE VICE-CHANCELLOR.

I think leave to amend should be granted. The proposed amendments are in writing, and should be made in accordance with the fifty-seventh rule. They must be made upon payment of costs, and without prejudice to the injunction or other orders heretofore made in the suit.

I think the answer should not be withdrawn, but left on file. The bill and answer should remain as they are, and the suit go on upon the newly engrossed amended bill.

 BOGERT vs. THE CITY OF ELIZABETH.

1. As a general rule, equity will not interfere to restrain the collection of a tax, which is illegal or void, merely because of its illegality, but there must be some special circumstances attending the injury threatened, to bring the case within some recognized head of equity jurisdiction.

2. The jurisdiction to declare such illegal or unconstitutional character, and to annul the title sought to be derived from the sales, belongs to the

Bogert v. City of Elizabeth.

s of law, and when recourse to those courts is omitted to be had, through the neglect or choice of the party aggrieved, there exists a suitable element on which this court can give relief.

Mr. I. S. Taylor and Mr. McCarter, for complainant.

Mr. Williamson, for defendant.

THE VICE-CHANCELLOR.

This cause was argued upon bill and general demurrer. In support of the demurrer the defendant's counsel insisted that the question presented was *res adjudicata*, and relied on the recently decided case of *Dusenbury v. The City of Newark*,* as substantially identical with the present one, and necessarily governing it. Upon hearing the opinion of the Chancellor in that case read by counsel at the argument, my impression was quite clear that it covered the present controversy, and further consideration has confirmed that impression. I shall, therefore, advise that the demurrer must be sustained.

In *Dusenbury v. Newark*, an assessment for street improvements was alleged to be illegal and void, in contravention of complainant's constitutional rights. The city was about to execute a declaration of sale for the complainant's lands, so resisted. He had lost his remedy by certiorari, because the limited time had expired. He asked relief in equity, because, under the law, in an action on the declaration of sale, that instrument would be conclusive as to the legality of the proceedings on which it was founded. He sought to have the making and delivery of the instrument enjoined. On the case thus alleged the complainant's bill was dismissed. The principle was, as a general rule, equity will not interfere to restrain collection of a tax, which is illegal or void, merely because of its illegality, but there must be some special circumstances attending the injury threatened, to bring the case within some recognized head of equity jurisdiction; otherwise the person

* Ante p. 295.

Bogert v. City of Elizabeth.

aggrieved will be left to his remedy at law. Reference is made in support of this ruling, to *Morris Canal and Banking Company v. Jersey City*, 1 *Beas.* 252, and *Liebstein v. Newark*, 9 *C. E. Green* 200.

I am unable to distinguish the adjudged case from the present one, so as to bring one within the jurisdiction of equity and not the other. In each, the declaration of sale sought to be prevented or set aside, is charged to be founded on an illegal and void assessment. In each, the assessment was reviewable at law for a limited time after confirmation, and in each, this review was omitted to be instituted by the party assessed, so that the legal remedy is alleged to be lost or inadequate. In the present case, the time limited for certiorari is much shorter than the time allowed in the adjudged case, and, by a recent supplement to the charter of Elizabeth, provision is made for a summary mode of ejectment, under a declaration of sale, which does not exist under the law applicable to the city of Newark. But I cannot see that either of these circumstances creates any equity sufficient to confer jurisdiction. The doctrine is, that this court will not assume to set aside titles founded on tax or assessment sales, simply because the taxes or assessments have been illegally or unconstitutionally imposed. The jurisdiction to declare such illegality, or unconstitutional character, and to annul the title sought to be derived from the sales, belongs to the courts of law, and when recourse to those courts is omitted to be made by the party aggrieved, either by his neglect or by choice, there exists no equitable element on which this court can give relief.

I will advise as above.

Melick v. Creamer.

MELICK and DAYTON vs. CREAMER and EMERY.

1. A deed absolute on its face, held to be a mortgage, it having been intended by the parties to be a mere security.

2. The general rule disallows costs to the complainant in a suit against a mortgagee to redeem. In this case, the special circumstances held to be such that neither party should have costs against the other.

Mr. G. A. Allen, for complainants.

Mr. Shipman, for defendant, Creamer.

THE VICE-CHANCELLOR.

The complainants ask to have a deed of conveyance, absolute on its face, decreed to be a security in the nature of a mortgage, and to be allowed to redeem by payment of the amount due on it. The deed was made November 3d, 1865, by Willis H. Emery to Amos W. Creamer, and was duly acknowledged and recorded on the same day. The estate conveyed, was an undivided vested interest of the grantor in the homestead farm held by his parents for life—a farm of about two hundred and sixty-eight acres, with dwelling-house and out-buildings of good description, and situated near High Bridge, in the county of Hunterdon. The grantor was about twenty-two years old when the deed was given, and gave it for a horse, which was sold him by Creamer for the price of \$140. This is the consideration named in the deed. The grantor sold and conveyed the same undivided interest by deed of June 17th, 1868, to the complainants, for the consideration expressed in the deed, of \$1800.

Their bill to redeem is upon the ground that the deed of November 3d, 1865, was intended by the parties to it, to be a mere security. They contend, and the defendant, Emery, expressly testifies, that there was no sale and conveyance of the premises in any absolute sense, but only to secure the

Duncan v. City of Elizabeth.

price of the horse, with interest. If this be the truth, the absolute character of the deed on the face of it, will be controlled and changed so as to conform its operation and effect to the real object of it. This is settled by many decisions in this state. *Sweet v. Parker*, 7 C. E. Green 453. The dispute is about the question of fact. At the close of the testimony, which was given orally before me, the argument of the case was postponed at request of counsel, in accordance with the rule. It has now been waived by the complainants and a written brief has been submitted for the defendant. I regarded the evidence as very strong and conclusive at the close of the testimony, to the point that the deed was given as a security. A new and careful examination of it has confirmed this opinion, and I have no hesitation in advising a decree for the complainants.

The general rule disallows costs to the complainant in a suit against a mortgagee on a bill to redeem. *Lozear v. Shields*, 8 C. E. Green 511. I have doubted whether, in this case, the defendant, Creamer, should not be subjected to costs, but the facts on both sides seem to me to be such that neither party should pay costs to the other.

I will advise a decree that the complainants may redeem, by payment of \$140, with lawful interest from November 3d, 1865, to the time of the payment, at any time within three months from the date of decree.

DUNCAN vs. THE CITY OF ELIZABETH.

It appearing from the bill and appended affidavit, and not being contradicted, that the complainant's lands in Elizabeth had been sold by the city for assessments, in connection with other lands not owned by him, and that the complainant's offer to redeem his own lands had been refused by the city, unless payment were also made of the assessment on the lands not his, an injunction was granted restraining the city from executing and delivering a declaration of sale of complainant's land.

Duncan v. City of Elizabeth.

Mr. I. S. Taylor, for complainant.

Mr. R. E. Chetwood, for defendants.

THE VICE-CHANCELLOR.

The rule to show cause why an injunction should not issue in this case, was argued upon the bill and appended affidavit. From these it appears that two pieces of land, situate in Elizabeth, and belonging now to the complainant, were sold by the comptroller of that city on the 6th of November, 1872, on account of the non-payment of an assessment for the construction of a sewer in Reid street. The amount of the assessment was \$146.28, and the two pieces of land were struck off to the city for the term of fifty years.

By the eighty-seventh section of the city charter, the owner of land so sold may redeem the same at any time within two years from the sale, by paying to the city treasurer for the use of the purchaser, his heirs and assigns, the purchase money, together with any other tax or assessment chargeable thereon, and which the said purchaser may have paid, and any sum of money expended in any improvement made by order of the city council, provided a notice of such payment has been filed in the office of the city treasurer, with interest on such purchase money, at the rate of fifteen per cent. per annum, from the time of such sale and expenditure, and on such payments from the time of filing the said notice.

By the eighty-eighth section, if the land so sold be not redeemed, as provided in the eighty-seventh section, the city may execute to the purchaser a declaration of sale therefor, which shall be recorded, and until so recorded, the land may be redeemed as above, notwithstanding the two years may have expired.

On the 25th of November, 1874, before a declaration of sale had been made, the complainant tendered to the comptroller of the city, \$238.46, the amount of the assessment, with interest, costs, and expenditures up to that time, and demanded a certificate of redemption. The certificate was

Duncan v. City of Elizabeth.

refused. The complainant's right to redeem was denied, except upon the payment, also, of other and later assessments or expenditures by the city upon the premises, amounting to about \$20,000. The city threatens to make and put upon record, a declaration of sale for the sewer assessment, unless all the later assessments and expenditures now due to it on the premises, are paid, in addition to the payment offered by complainant.

The question was discussed at the argument, whether, under the eighty-seventh section, the city could be regarded as a purchaser in respect to the provisions therein contained for redemption. It was insisted that such provisions were applicable only to others, and that while the city might, by virtue of other sections, be empowered to purchase at a sale, it could not be held to have paid assessments imposed by itself, and in respect to which no sale had been made. I shall not decide this question at this stage of the cause, but shall hold this and other points then discussed, for further consideration. I shall do so, because I am clear that, upon one ground alone, which an answer may meet, a temporary injunction should issue. This ground is the fact that some of the assessments, of which payment is required as a condition of redemption, include not only other lands of the complainant, besides the two pieces in dispute, but also lands which the complainant does not own. No reason is suggested, and I am unable to see what good reason can exist, why the complainant should be compelled to submit to this demand. Upon the face of it, it is unreasonable and oppressive. It is charged by the bill, and supported by the affidavit, and must, for this application, be taken as true.

It was urged on behalf of the city, that the complainant's tender was to the wrong city official. This seems to be true, but it is an objection that ought not to prevail under the facts as they appear. The tender was to the comptroller, instead of the treasurer. The complainant is ready to pay, and his tender was not declined for the cause that the official to whom it was made, was not the proper one to receive it. I think

Kline v. McGuckin.

the city must be held to have refused to allow the complainant to redeem, except upon illegal terms. The effect of the execution and recording of the declaration of sale will, under the provisions of the charter and the general law respecting deeds of that description, be an injury for which no adequate remedy will exist at law.

I shall advise that, upon tender by complainant to the city treasurer of the amount due on the sewer assessment, for principal, interest, and costs, and the treasurer's refusal to accept it, and to give a certificate of redemption, an injunction issue in pursuance of the prayer of the bill.

KLINE vs. MCGUCKIN and others.

Where a mortgage is shown to be an open one, the holder of it can recover nothing but what is proved with reasonable certainty to be due. Doubts and indefiniteness should work against the mortgagee and not in his favor. The burden of proof is on him.

Mr. J. N. Voorhees, for complainant.

Mr. W. J. Magie, for defendants.

THE VICE-CHANCELLOR.

By a decree heretofore made in this suit, pursuant to the opinion in 9 *C. E. Green* 412, a deed of conveyance absolute on its face, bearing date April 23d, 1860, and made by Edmund B. McGuckin to his brother, James B. McGuckin, was adjudged to be a security in the nature of a mortgage. The amount due on it did not sufficiently appear, and leave was therefore given to the parties to produce further evidence in regard to it. Two of the witnesses originally examined have been recalled, and the settlement of the amount, which has been for some time suspended with the expectation of

Close v. Close.

other witnesses being produced, is now submitted for decision without argument.

The evidence before me is general and indeterminate. The case is one where doubts and uncertainties should operate against the mortgagee and not in his favor. His mortgage is an open one, and he is entitled to recover nothing under it, except what is affirmatively made to appear with reasonable certainty of proof. His inability to establish the amount with accuracy, is attributable to his own carelessness or neglect. The general estimates made by himself and his brother-in-law, Sherwood, both of whom are interested parties, are not supported by the testimony of his brother, Edmund B., whose interest in the result, as the case stands, is less influential than theirs. It is clear that an indebtedness did exist at the date of the deed, and the best judgment I can form is, that it may be justly fixed at that time at the sum of \$2000. That it was not less than this, appears from the testimony of Edmund, and though the testimony of James and Sherwood makes it nearly twice as much, I should not feel warranted, in view of the character of the proofs, in advising a decree for more than the amount above named. The error, if any, ought to be against the mortgagee.

I will advise that the complainant be allowed to redeem, by the payment of \$2000, with interest from the date of the deed, or to sell the premises under his foreclosure suit, subject to the lien of the deed thus defined.

CLOSE vs. CLOSE.

In fixing a yearly sum for alimony, after final decree for divorce from bed and board, the large and valuable real estate of the husband ought not to be regarded as an ordinary farm, in judging of his faculties. The defendant should be called on to change the character of the property in which his wealth is invested, if such change is requisite, to make suitable provision for his wife, driven, by his extreme cruelty, from his house.

Close v. Close.

Mr. C. Parker, for complainant.

Mr. C. H. Winfield, for defendant.

THE VICE-CHANCELLOR.

The complainant having obtained a decree of divorce against her husband, from bed and board, on the ground of his extreme cruelty, it was referred to me to advise what order should be made touching the custody of the infant children and alimony. The proofs, prior to the decree, were directed to be considered by me, as well as other proofs to be taken. The parties themselves, and the witnesses produced by them, have been examined before me, and testimony has also been taken out of the state by commission.

The parties were married in 1846. The bill of complaint was filed in October, 1870. A few weeks prior to that date the complainant was compelled to leave her husband's house, with an infant child about four months old. She was the mother, by him, of nine children, then living, of whom the eldest, a daughter, was about twenty-three years old. The complainant had no estate of her own. Her husband was possessed of a large property, and, for about ten years, had been living in Bayonne, near to Jersey City. He was a retired man of business. The larger part of his property consisted of the tract of land on which they were living, being about forty acres, and so situated as to be capable of division into building lots. It had risen greatly in value since it was purchased, and is shown by the proofs to be worth now, at a low valuation, the sum of \$150,000. It is shown by the proofs to be saleable in larger or smaller parcels, for good prices, if the owner were willing to sell. Besides this property, the defendant is possessed of an interest in a cemetery, in the city of Washington, from which he derives an income, yearly, of several thousand dollars. I think, from the evidence, that his yearly income from this source may be put at \$4000, at the least.

Close r. Close.

An order was made by Chancellor Zabriskie, a few months after the filing of the bill, and after testimony and argument, by which the defendant was directed to pay to the complainant, for alimony *pendente lite*, the sum of \$25 per week. The defendant has neglected to pay this weekly sum since March 4th, 1874. The final decree of divorce was obtained in July, 1874. It appears, I think, quite clearly, from the evidence, that the defendant is so managing his property—allowing it to become so circumstanced as to enable him to offer plausible objections to the payment of anything for alimony. The only difficulty I have had in fixing upon a sum for permanent alimony, grows out of the condition and character of his estate. But I am satisfied that the situation in which he has brought it, or designedly suffered it to be, cannot be allowed to defeat the manifest justice of the case, in respect to the complainant and the children, whose custody should be given her. In judging of his faculties, his large and saleable real estate ought not to be regarded as an ordinary farm. I think it plainly a case where the defendant should be called on to change the character of the property in which his wealth is, to a great extent, invested. If he were to do so, his income would be adequate to a very liberal provision for himself and the complainant and the minor children, however the custody of the latter might be apportioned. In this view, and having regard to the facts of this case, as disclosed by the evidence, I shall advise that the complainant be decreed to have the custody of two of the children, in addition to the youngest child now in her charge. The two children, whose welfare calls strongly, in my judgment, for the society and care of their mother, are the younger daughters, Annie and Eva, aged, respectively, about twelve and ten years. There is no need of referring specially to the evidence to exhibit the probable influence upon these children, of their father's temper and habits. There can be no doubt that such influence would be highly unfavorable.

As permanent alimony for the mother and for the children I advise the yearly sum of \$3000, payable monthly. This

Close v. Close.

sum is to cover all her and their expenses, and to provide for their nurture and education, as long as the order directing it shall be in force. I think the mother, being expelled from her husband's house, where her other children still are, should be so provided for that, by economy suited to her husband's means, she may receive visits from all her children, and that she ought not to be limited to an allowance that would prohibit her from a reasonable enjoyment of their society. Looking to all the facts of the case, my judgment is that the above yearly sum is by no means too large. The order should provide, in usual terms, for a modification of the allowances, as future exigencies may arise.

The order will contain, also, the customary provisions in respect to the methods of its enforcement. Should the defendant desire to make sale of any part of his lands, or to raise money by mortgaging them, the willingness of the complainant to execute the conveyances will, of course, be requisite to enable him to carry out such purposes. Should such willingness be wanting, it would furnish ground to ask for a change of the order now advised. In respect to the unpaid weekly sums, since March last, I do not now advise any order adjudging the defendant to be in contempt.

CASES

ADJUDGED IN

THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1875.

MOTT, trustee, *vs.* E. MERCER SHREVE.

The complainant took a decree for sale of the mortgaged premises to raise the interest due on the mortgage, and costs of suit. The principal was not due. The decree provided for the sale of the premises to raise the interest and costs, and that the mortgage stand as a lien for the payment of the principal, with the interest to become due thereon, according to the condition of the bond. The complainant purchased the property at the sale under the execution, and subsequently applied to be relieved from his bid, on the ground of surprise; that he was not aware that in purchasing the property, he would extinguish his mortgage. Application refused.

Motion to relieve complainant from bid at sheriff's sale, and to open and amend the final decree in the cause, and to amend the execution.

Mr. F. Kingman, for the motion.

Mr. E. Mercer Shreve, contra.

THE CHANCELLOR.

The complainant applies to be released from his purchase of the mortgaged premises at the sale under the execution issued in this cause, and for an amendment of the final decree

Mott v. Shreve.

and execution, so as to provide for the sale of the premises to pay and satisfy the principal of the mortgage and all interest due thereon. The occasion of this application is, that by consent of the solicitor of the complainant and the defendant, E. Mercer Shreve, the obligor and mortgagor, and the consequent direction of the former, the master, by his report, dated January 23d, 1874, after reporting the amount due to the complainant for interest, (\$3150,) on the mortgage, and that the mortgaged premises were so situated that there could not be a sale of part thereof to raise the interest, (the principal of the mortgage was not due, and will not be till April 15th, 1877,) and costs, without great prejudice to the remainder of the property, certified that the solicitor of the complainant had appeared before him and stated that the complainant's bill had been filed and the suit instituted to raise and compel the payment only of the interest money, which had accrued and become payable on the mortgage; that the principal was not demanded or required, and that under the circumstances of the case, the complainant desired that the mortgaged premises should be sold to raise and pay the interest money, which was then due and payable, leaving the mortgaged premises subject to the lien of the mortgage to secure the payment of the principal sum of \$30,000, with the interest to grow due thereon, according to the condition of the bond. The master thereupon reported that in his opinion, it was just and reasonable that the mortgaged premises be sold to raise and satisfy the interest money then due, with costs, and that the mortgage stand as a lien for the payment of the principal with the interest to become due thereon, according to the condition of the bond. On the 27th day of January, 1874, a final decree was made in the cause in accordance with the recommendation of the master, and directing that the mortgaged premises be sold accordingly. The decree contained a personal decree for deficiency against the defendant, Mr. Shreve. A writ of *feri facias* was issued to the sheriff of Mercer, in conformity with the directions of the decree, commanding him to make sale of the premises, subject to the principal of the mortgage

Mott v. Shreve.

and the interest to accrue thereon, according to the condition of the bond, to raise the interest reported due, with the costs. Under this writ, the sheriff set up the premises for sale with due proclamation, to apprise all persons desiring to purchase, that the purchaser would buy the premises subject to the principal of the mortgage and the interest to accrue, according to the condition of the bond, and after various bids, the premises were struck off and sold to the complainant, who was the highest bidder, at \$2200. He signed an acknowledgment of his purchase, and gave his check for the deposit required by the conditions of the sale. Afterwards, he became dissatisfied with the purchase, and directed the sheriff to re-advertise the premises and re-sell them. Mr. Shreve thereupon applied to this court to restrain the sheriff from re-selling the property. The application was granted. The complainant now asks, as before stated, to be released from his bid, and that the decree and execution may be amended, so as to provide for the sale of the whole of the mortgaged premises, to raise the principal with the interest reported to be due, and costs.

The complainant alleges that when he purchased the property he was not aware that, by his purchase, he would merge his mortgage; and he insists that the decree, as it stands, is not lawful, because it is not in conformity with the sixty-seventh section of the chancery act. *Nix. Dig.* 114. *Revision, tit. Chancery, § 74.*

It appears by the testimony taken in this matter, that the complainant's solicitor bid for him, in his presence, throughout the sale. As before stated, the complainant signed an acknowledgment of his purchase, and gave his check for the required deposit. His solicitor and he both must be presumed to have been aware of the effect of the purchase of the property by the complainant, that it would extinguish the mortgage. What other result could have been expected or anticipated? The complainant caused the property to be set up for sale, subject to the principal and interest to become due on his mortgage. He says in his petition, that he knew the property was to be sold subject to the

Mott v. Shreve.

principal of his mortgage. In his testimony he says, that the property was put up by the sheriff, to be sold subject to the mortgage of \$30,000, and that it was so announced at the time of the sale. If a stranger had bought the property, he would have taken it subject to an equitable lien in favor of the complainant for the amount of the principal and the interest to accrue thereon. The mortgage, however, would have been gone, for the purchaser would have acquired, by his purchase, all the interest of the mortgagor and mortgagee. But when the complainant himself became the purchaser, the encumbrance was merged in the legal estate he acquired by the sale, and the debt was in equity extinguished. *Cox v. Wheeler*, 7 Paige 248. The complainant cannot be relieved from his bid on the ground of his ignorance of the effect of his purchase. His solicitor, in his testimony, says the last bid previous to the one on which the property was struck off, was \$2100, and thereupon he bid \$2200. He says it had not, so far as he knows, and as he believes, entered into the mind of either himself or the complainant, that the latter should become the purchaser, and that he thought there would be no danger in bidding; that Mr. Shreve would see that the property brought the amount of the decree, or near it. It was no part of the duty of either of these gentlemen, the counsel or his client, to secure a good price for the property by puffing. Nor can I amend the decree. It was made by consent—by arrangement between the solicitor of the complainant and Mr. Shreve. Their correspondence which led to it, is before me. It shows, as does the master's report, that the decree was made deliberately.

The section of the chancery act above referred to, provides that when a decree of this court shall be made for the sale of mortgaged premises, where the whole sum secured by the mortgage is not due, either for non-payment of any portion or installment of the debt or demand intended to be secured by the mortgage, or the non-payment of interest due, or both, if it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount due, without

Mott v. Shreve.

material injury to the remaining part of the mortgaged premises, and that it is just and reasonable that the whole of the mortgaged premises should be sold together, it shall and may be lawful for the court to decree a sale to be made of the whole of the mortgaged premises, &c. The argument of the complainant's counsel is, that the mode thus pointed out must be adopted in all cases within the description, and that, therefore, it was not competent for the court to make the decree made in this case, but it was obligatory on the court to order the whole of the mortgaged premises sold. The statute in question is permissive in its terms. It obviously does not preclude the court from making a decree by consent of the parties in interest, for the sale of mortgaged premises in any different method from that designated therein. In this case, the complainant is not in a position to claim the protection of the court as against the decree. He was not deceived; he was not even *inops consilii*. His counsel conducted the correspondence, and, as appears by the master's report, controlled the action of the master; obtaining from him the recommendation that the decree be made for the sale of the property to raise the interest, subject to the encumbrance of the principal and the interest to become due. His counsel drew the decree, and it appears to have been drawn carefully. No fraud is suggested. By the sale under the decree, if a stranger had become the purchaser, the complainant would not only have obtained payment of so much of the interest due as the net proceeds of the sale would have paid, but would have obtained additional security for the payment of the money, subject to the lien for which the property was sold, for the purchaser would have become liable for the payment of the debt which he would have been held to have assumed. The complainant, having chosen to buy the property himself, has all the advantages of the purchase. He has taken the property in payment of the mortgage debt and all the interest accrued and to accrue on it, except the amount of interest reported due and not raised by the sale, for which he will be at liberty to look to his personal decree for deficiency against Mr.

Coffin v. Loper.

Shreve. It appears that there were several bids at the sale, and that there was one person, as before stated, who was willing, as his bid showed, to give \$2100 for the property, subject to the principal of the mortgage and the interest to accrue thereon. The complainant was not willing to permit him to purchase the property at that price, but himself bid a greater one. Since the sale, the property may have, and probably has, depreciated in value. These considerations are, in themselves, important, and would, if the way were otherwise clear to granting to the complainant the relief he seeks, prevent the court, out of regard for the rights of the defendant, who has done no wrong, and is not charged with any manner of deceit, from according it. There appears to me to be no good reason for opening the decree.

The petition will be dismissed, with costs.

COFFIN vs. LOPER and others.

It is the practice of this court to stay waste between tenants in common, in special cases, among which is the pendency of a suit for partition.

In partition. On bill and answer. Motion to dissolve injunction.

Mr. W. E. Potter, for the motion.

Mr. P. L. Voorhees, contra.

THE CHANCELLOR.

The bill is filed for the partition of a tract of cedar swamp in Gloucester county, of which the complainant claims to own three-sevenths in fee. It also prays an injunction to restrain the defendants from cutting the timber off the property. It alleges that the defendants are the owners of the remaining four-sevenths of the land. The answer wholly denies the

Coffin v. Loper.

complainant's title, and claims that the defendants are the lawful owners of the whole property. It admits, that at the filing of the bill, the defendants intended and had taken measures to sell off all the timber on the tract. The defendants now move to dissolve the injunction. They insist that on the case made by the bill, it cannot be sustained; that this court will not, according to its established practice, allow an injunction to stay waste between tenants in common, unless there is danger that the estate will be so injured that damages will not compensate for the waste, or on proof that the tenant, whom it is sought to enjoin, is insolvent. The injunction in this case was issued to stay, *pendente lite*, threatened waste, which it appears by the answer, would have extended to the stripping of the property of all the timber on it, and it appeared on the argument, by the admission of counsel, that the land without the timber, is of but very little value. It is manifest that the exercise of the restraining power of the court is peculiarly proper under circumstances such as this case presents, and which it presented at the filing of the bill. It is the practice of the court to stay waste between tenants in common in special cases, among which is the pendency of a suit for partition. *Obert v. Obert*, 1 *Halst. Ch.* 397; *Harley v. Clowes*, 2 *Johns. Ch.* 122; *Kerr on Injunctions* 258, § 5; *Hilliard on Injunctions* 354. The granting of the injunction in the present case, was also within the equity of the statute providing that in any action in which the right to real estate, or to goods and chattels, is in controversy, the court or any judge thereof, may make an order for the protection of the property in controversy, from waste, destruction or removal beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and may enforce such order by attachment for contempt. *Revision, tit. Practice of Law*, § 286. See also the learned *Note A* to *West v. Walker*, 2 *Green's Ch.* 279. In view of the denial of the complainant's title, the suit must be stayed. The bill will be retained to afford him an opportunity to establish his title at law, which he will be required to do without unnecessary delay. In the meantime, the injunction will be retained.

Stone v. Stone.

STONE vs. STONE.

1. An acknowledgment of service of a copy of the citation in a divorce suit is not evidence of a legal service, to give the court jurisdiction where the defendant does not appear. There should be evidence of the service of a copy of the petition also.

2. In a suit for divorce for desertion, the desertion must appear from the facts sworn to.

Petition for divorce on the ground of desertion.

THE CHANCELLOR.

The petition alleges that the parties to this suit lived together after their marriage, in 1844, for about seven years, and until the month of May, 1862, when the defendant deserted the petitioner, and left the state, as the latter has understood and believes; that the defendant has since then lived in Newark, in this state, for a short time, but not with the petitioner, who was then residing at her usual place of abode, in Dover, in the county of Morris; that he did not come to the place where she lived; that his residence, at the time of filing the petition, was not precisely known to her, except as she was informed, and believed that he was living in adultery, in Philadelphia. The petition was filed on the 13th of August, 1874. The citation was issued on the next day. It appears, by an acknowledgment endorsed on the writ, and signed by the defendant, that a copy of the citation was served on him on the twenty-second of the same month of August. No copy of the petition was served on him. The service, therefore, was not complete, and is invalid. The defendant did not appear in the suit. The order for proofs was irregular, and could not be sustained.

The proof in the case, however, does not sustain the charge of desertion. The principal testimony is that of the petitioner. She and her daughter were the only witnesses, and the proof

Stone v. Stone.

of the alleged desertion rests wholly on their testimony. The petitioner testifies that the defendant was in Dover, in the winter of 1870, engaged at work in the car factory, near that place; that he remained there six months; that part of the time he lived with her as her husband, and the rest of the time he boarded with her; that he left Dover in May, 1869; (she probably intended to say 1870;) that the reason of his leaving was that a woman came there from Philadelphia, to obtain support from him for a child which she had had by him; that he made a satisfactory arrangement with the woman for the support of the child, and she left town; that this settlement was made in the early part of April, 1869, and the defendant left Dover in May, following; that when he went away he said he was going to New York, and that, since then, he has not lived with the petitioner; that he has contributed nothing to her support since he left Dover, in May, 1869, and that she has heard from his mother that he lived in Orange, in this state, part of one summer, since then. She says he visited Dover on the 4th of July, 1874; that on that occasion he called at her house and asked to see his grandchild, who, with its mother, their daughter, lived with the petitioner, and that he made no errand to see the petitioner, and that that is the only time she has seen him since he left. The daughter testifies that the defendant left Dover in the spring of 1870; that he returned to Dover on the 4th of July, in that year; that he came to see her and her child, and not the petitioner; that he came again on the 4th of July, 1874, to see the witness and her child, and that he has not been in Dover, to her knowledge, since the last date.

In all this there is no proof of desertion. There is no evidence of any desire, on the part of the petitioner, that her husband should live with her. She has made no effort to that end. Nor does it appear that she was willing to live with him. The testimony would be consistent with the theory that she refused to live with him. He returned to his family as lately as the 4th of July, 1874. They say he came to

Raymond v. Post.

see his grandchild, and "made no errand" to see his wife, but what reception he met with on the occasion does not appear. For aught that appears in the testimony, the defendant was desirous of living with his wife during the time of his absence from her. The witnesses must have known not only the circumstances of the alleged desertion, but also as to the willingness or indisposition of the defendant to live with the petitioner. They have not testified as to either of those matters.

The master has not observed the provision of the one hundred and fifty-ninth rule, that in divorce suits based on desertion, the master shall examine into and report the facts and circumstances under which the desertion took place, and the reasons which caused or provoked it, if the same can be ascertained.

The decree of divorce will be denied, and the petition dismissed.

RAYMOND vs. POST and others.

1. In examining a lien claim alleged to be a cloud upon title, the court will not admit extrinsic evidence in aid of the claim, but will examine the record evidence only.

2. Where a lien claim was filed after the commencement of a suit in this court to foreclose a mortgage which was on the land before the work was done or materials provided for which the lien was claimed, and the lien claimants were not made parties to the suit, and did not apply to be made parties, the claim was held to be cut off by virtue of the provisions of the "act relating to the Court of Chancery," (*Pamph. L.*, 1870, p. 40,) by sale under the foreclosure.

3. The act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," (*Pamph. L.*, 1870, p. 20,) applies to a lien claim.

On final hearing on pleadings and proofs.

Mr. S. B. Ransom, for complainant.

Mr. John Hopper, for defendants.

Raymond v. Post.

THE CHANCELLOR.

The bill in this cause is filed for a perpetual injunction to restrain the defendants from selling, under an execution on a judgment under a mechanic's lien claim, certain premises, part of the Holsman or Santiago Park property, in Bergen county, purchased by the complainant at sheriff's sale, under a foreclosure in this court. It also prays that the judgment may be decreed to be no lien on the property described therein, and that the complainant's title to the premises described in the lien judgment may be quieted and cleared of all doubts and disputes concerning the same. The following are the facts on which the prayer of the bill is based: On the 25th of September, 1867, Francisco J. Montego was the owner of the Santiago Park property. It contained about one hundred and sixty-nine and a-half acres. There was a mansion-house upon it. On that day, Montego gave to George H. Whipple ten mortgages of that date upon the property, each for \$10,000, with interest, to secure the payment of \$100,000, with interest. These mortgages were duly registered in the Bergen county clerk's office, on the day of their date. Whipple assigned eight of them to George Griswold, on the 14th of October, 1867, and the latter assigned them to John N. Alsop Griswold on the 13th of May, 1868. Whipple, on the 14th of October, 1867, assigned another of the mortgages to the University of the City of New York, and on the same day assigned the remaining one to George Griswold, trustee. Subsequently to giving the mortgages to Whipple, Montego leased the premises by lease dated January 25th, 1869, to Isaac Herbert, for the term of four years from the 1st day of April, 1869. On the 12th of March, 1869, Montego gave to the firm of Thomas J. Owen & Co. a mortgage on the property, to secure the payment of \$35,000, with interest. The mortgages to Whipple provided for the payment of the interest semi-annually, and that if any payment of interest should be unpaid for sixty days after it should fall due, the whole of the principal of the mortgage should thereupon be due and payable. The half year's

Raymond v. Post.

interest which fell due on the 25th of March, 1870, on the eight mortgages held by him, being unpaid for sixty days, John N. Alsop Griswold, on the 12th of July, 1870, filed his bill in this court to foreclose those mortgages, making Montego, the University of the City of New York, George Griswold, trustee, Thomas J. Owen & Co., and Herbert, parties defendant thereto. A decree *pro confesso* was entered in that suit against all the defendants, on the 20th of October, 1870, with a reference to a master, to report amounts and priorities. The master, on the 7th of November, 1870, reported that there was due to the complainant in the suit, \$86,268.90 ; to George Griswold, trustee, \$10,783.58 ; to the University of the City of New York, \$11,133.58 ; and to Thomas J. Owen & Co., \$42,350—in all, \$150,536.06. On the 15th of November, 1870, a final decree was entered, confirming the report, and directing that the premises be sold by the sheriff of Bergen, to pay the encumbrances. Execution was issued accordingly, on the 20th of January, 1871. On the 6th of May, of that year, the sheriff sold the property under it to the complainant in this suit, for \$142,000, which the complainant paid in cash. On the 23d of July, eleven days after the filing of the bill in the above cause, the defendants in this suit filed their claim of lien under the mechanics' lien law, against a building on the property, with a curtilage of about five acres. The lien claim states that the claim is for the payment of \$2400, with interest thereon from July 30th, 1869, which debt, it declares, was contracted by Herbert, as builder, "for labor performed, and materials for the same, provided by them within one year last past, for, and in the erection of, an addition to said building, by doing all the work thereof, and furnishing the materials for the same." The "owner" was stated to be Montego, who, it was declared, had an estate in fee simple in the premises. Herbert was stated to be the person who contracted the debt, and for whom, and at whose request, the work and materials were done and furnished. A bill of particulars was given. The items ran from April 3d, 1869, to July 30th, 1869. The amount of the bill of

Raymond v. Post.

particulars was \$5762.65—reduced, by credits, to \$2400. None of the items in the bill, except the last, which is dated the 30th of July, 1869, are of a later date than June 12th. The items under date of July 30th, are two; one is three hundred and six feet of narrow flooring—\$13.77; and the other, four hundred and ninety-three feet of narrow ceiling—\$22.19; together, \$35.96. The summons on this claim was issued, as before stated, on the 25th of July, 1870, more than a year after the date of all the items in the bill of particulars, except the last. Judgment in the suit was entered on the 12th of May, 1871, against Herbert, as builder, and the building and land described in the lien claim, for \$2699.55, including costs. A special writ of *fiery facias* was at once issued on the judgment, directed to the sheriff of Bergen, who was about to sell the premises therein described under it, when the injunction issued in this cause, restraining him from so doing, was served upon him.

The question presented is whether the lien claimed by the defendants, is valid against the property therein described. It may be stated that the defendants insist that Montego's consent to the construction of the building on the premises, was obtained by them before they commenced the work. The first inquiry is as to whether the lien claim is valid, irrespective of the effect of the foreclosure upon it. There is no allegation either in the lien claim or in the declaration in the suit upon it, that the work was done and the materials furnished, pursuant to a contract. The declaration contains the common counts only, with a copy of the particulars contained in the lien claim. The defendants, indeed, in this suit, allege that the work was done under a contract, which they produce and prove. But in this controversy, the record alone must speak. The question here is between the lien claimants and a purchaser of the property, who at the time of his purchase, was ignorant of the existence of the lien claim. Extrinsic proof is not admissible to sustain the claim. The court must judge of the claim in such a controversy as this, by an inspection of it and of the record of the proceedings

Raymond v. Post.

upon it. *Associates of the Jersey Co. v. Davison*, 5 *Dutcher* 415; *Bement v. Trenton Locomotive Co.*, 2 *Vroom* 246; *S. C. in Error*, 3 *Vroom* 513. By the twelfth section of the mechanics' lien law, (*Nix. Dig.* 574,) it is enacted that no debt shall be a lien by virtue of that act, unless a claim is filed as thereinbefore provided within one year from the furnishing the materials or performing the labor for which such debt is due, and that such part of any claim filed, as may be for work or materials furnished more than one year before the filing of the same, shall not be recovered against the building or land by virtue of that act; nor shall any lien be enforced by virtue of that act, unless the summons in the suit for the purpose, shall be issued within one year from the date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be endorsed on the claim by the clerk upon the sealing thereof, and if no such entry be made within one year from such last date, such lien shall be discharged. Judging this lien claim by its contents, the building and land were, when it was filed, discharged from the whole of the demand for which it was filed, except the last item, for all the rest of the materials were furnished and all the work done more than a year before the claim was filed. The defendants insist that inasmuch as the work was done and materials furnished by contract, for and in the erection and construction of a building, the year within which the claim was to be filed and summons issued, began to run only from the time when the building was completed. But, as before stated, extrinsic evidence that the work was done under contract, is inadmissible. Were it admitted, there is no proof in the cause on which reliance can be placed, as to when the building was finished. John P. Post, one of the defendants, is the only person who testified on the subject, and the only testimony he gave on this point was in his cross-examination. It is far from satisfactory. And again, it appears that the contract price of the work was to be \$5081, while the amount of the demand for which the lien claim was filed, was \$5762.65. Nearly \$700 then, of this latter amount, was for extra work to

Raymond v. Post.

which the contract did not apply. The witness, Post, says the lien claim was filed for work done in erecting the building under the contract, and extra work. The lien claim makes no discrimination between these. It is quite impossible to determine, by the dates of the bill of items which it contains, when the work under the contract was completed. The lien claim would, at most, be valid then, against the building and land, for only the items under date of July 30th, and costs. Those items amount to \$35.96, and the costs were \$61.40. Together, they amount to \$97.36.

I have thus far considered the question of the validity of the lien claim, without reference to the effect of the foreclosure upon it. By the foreclosure, the lien claim against the building and land was cut off, and the land was sold under the foreclosure, discharged of that claim. The act of March 17th, 1870, "relating to the Court of Chancery," (*Pamph. L.*, 1870, p. 40,) provides that in any suit for the foreclosure of a mortgage upon, or which may relate to real or personal property in this state, all persons claiming any interest in, or an encumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien, or any instrument which, by any provision of law, could be recorded, registered, entered or filed in any public office of this state, and which shall not be so recorded, registered, entered or filed at the filing of the bill in such suit, shall be bound by the proceedings in such suit, so far as the property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person, on causing such conveyance, mortgage, assignment, lien claim or other instrument to be recorded, registered, entered or filed as provided by law, may cause himself to be made a party to such suit, by petition, in the same manner as provided by that act in the case of persons acquiring an interest in the subject matter of a suit after its commencement. The provisions of that act require diligence and action on the part of those who may have claims against mortgaged premises, which may be re-

Raymond v. Post.

corded, registered, entered or filed in any public office in this state, to protect their interest in those premises in case of proceedings for foreclosure. They are to put their deed or mortgage or other instrument under which they claim a title to or lien upon mortgaged real estate, on record. If their claim be by virtue of mortgage of chattels, it must be filed. If it be under a lien given by statute, they must file their lien claim. If, after a suit commenced, they desire to intervene to protect their rights, they must record, register or file the instrument under which they claim, and then, on application, may be admitted to defend. The necessity for this statutory provision is evident. In the case before us, mortgages to the amount of \$135,000, of principal, were on record when the defendants in this suit entered into an agreement to erect the building. A foreclosure suit was commenced on one of them on the 12th of July, 1870. The building, as the defendants admit, had then been completed nearly a year. As the complainant insists, it had been completed more than a year. At any time in about twelve months prior to the beginning of the foreclosure suit, they might lawfully have filed their lien claim for their whole demand, for it had all been contracted. Had they done so, they would have been necessary parties to the bill. Not having done so, they must abide by the consequences of such neglect and of their neglect to apply to be made parties after they had filed their claim. The law of 1870, above referred to, was in force when the bill was filed, which was on the 12th of July, 1870.

This suit is brought under the act of March 2d, 1870, to compel the determination of claims to real estate in certain cases, and to quiet the title to the same. *Pamph. L.*, 1870, p. 20. The complainant is in peaceable possession of the premises in dispute. No issue has been requested. The defendants will be perpetually enjoined from selling under their judgment, and their lien claim and judgment will be decreed to be no encumbrance on the land in question.

The complainant is entitled to costs.

Johnston v. Hyde.

JOHNSTON vs. HYDE.

The defendant, under and in the assertion of a claim of right, threatened to enter upon the complainant's premises, of which the latter was in possession, and himself to secure a right, of which he alleged he had been deprived, and, in so doing, would inflict irreparable injury on the complainant, who denied his right, and there was evidence in the defendant's answer, from which acquiescence, on the part of the defendant, might be deduced. The court restrained the defendant, by preliminary injunction, from doing the threatened injury.

On bill and answer. Motion to dissolve injunction.

Mr. C. Parker, for the motion.

Mr. B. Williamson, contra.

THE CHANCELLOR.

The complainant filed his bill for an injunction to restrain the defendant from entering upon the premises of the former, in Plainfield, and interfering with a wooden aqueduct which the complainant has placed there, and from interfering with the premises for any such purpose. On the filing of the bill an injunction was granted. The controversy between these parties is in reference to a raceway, running through the complainant's premises, which adjoin those of the defendant, to a pond on the defendant's land, the water from which pond was used for mill purposes there. The defendant claims the right to have and maintain the raceway in question as an open raceway; and, also, the right to free ingress, egress and regress, over a strip of land thirty feet wide, including the raceway, to amend the raceway, and repair and keep it in order. These rights he acquired, he insists, by the deeds of conveyance under which he claims title to his land, and the reservations in the deeds of conveyance under which the com-

Johnston v. Hyde.

plainant claims title to his property. The complainant, in or about the fall of 1872, placed in the bed of the raceway, on his grounds, a box culvert, which he covered up with earth, filling the raceway to the surface of the ground. He then covered the place thus filled up with sod, and across it constructed a macadamized road, leading from his mansion-house to his stables on his premises. The defendant was then the owner of the premises he now occupies, being the property above mentioned as belonging to him. At that date the parties were on neighborly terms. The defendant, in July, 1872, sold and conveyed to the complainant a piece of his land, containing about three acres and a-half, adjoining the complainant's premises, as they were when the defendant purchased his property. By the deed the defendant excepted and reserved to himself, his heirs and assigns, the right of the raceway, as it was then opened, leading to the pond below, with all necessary rights to enter upon the premises, along the line of the same for the purpose of cleaning it out and keeping it in repair, as theretofore. In the fall of 1872, and after the making of that conveyance, there was laid through the complainant's land an avenue, called Farragut road. The raceway crossed that road. According to the defendant's statement, the complainant had proposed to lay in the bed of the raceway, through his grounds, an iron pipe, of one foot in diameter, and fill up the raceway. The defendant says he refused to permit this. Shortly afterwards, he says, he saw a wooden box culvert lying at Farragut road, and, being told by complainant's carpenter that it was intended for carrying the water of the raceway under ground, he objected to it, and forbade it, and thereupon complainant, under date of November, 1872, wrote to him as follows: "The surveyors of Somerset county have prepared a wooden culvert, three feet wide, to be placed in the Hotchkiss raceway, where it crosses Farragut road. It is understood and agreed between us that, by suffering this to be done, you are to lose no legal rights to the present width of raceway, and that, in case of your finding the flow of water insufficient, you shall have the same

Johnston v. Hyde.

rights as now to require the enlargement of the same. It is not the intention of this paper to give any rights, but only to guard against the loss of any that now exist." After receiving the letter the defendant made no objection to that arrangement, and it was carried out. Subsequently, the complainant caused a like culvert to be put in the raceway on his land, on both sides of that road, and covered up the box, filling in with earth to a level with the surface of the ground, as before stated. The defendant says he observed this to his surprise, but he seems, from his own statement, to have offered no objection, protest or remonstrance. He relied, he says, for the protection of his rights in the matter, on the assurance contained in the above letter. At that time the water in the raceway was not used for mill purposes. The mill on the defendant's premises appears, from the answer, not to have been used for over three years, from February, 1871, to July, 1874. At the latter date he repaired it, and in the succeeding fall he let the water into his pond, which was soon filled through the culvert. He alleges that it was due to the season, it being a time of freshet. Subsequently, having drawn off the water from his pond, he proceeded to fill it, and found that the supply of water was cut off. He then went on the complainant's premises to ascertain the cause, and discovered that the gate, which the complainant had placed at the mouth of the raceway, had been securely fastened down and prevented the flow of the water. The defendant removed the gate, and an altercation between him and the complainant took place on the occasion; the defendant claiming the right to have the raceway open, and to have the right of ingress, egress and regress, above mentioned. He admits that he intended, after demand and refusal, to open the raceway to a width and depth in accordance with what he regards as his right in the premises. To prevent this action on his part, the injunction was granted. Without reference to any other question, the case on the bill and answer, presents sufficient evidence of acquiescence on the part of the defendant to induce me to retain the injunction, with

Johnston v. Hyde.

the modification hereinafter stated, until the hearing. The threatened action of the defendant would inflict great and irreparable injury upon the complainant's property, to which the complainant should not be subjected, unless he is in the wrong. That action, if unwarranted, would be such a trespass as this court will restrain. *De Veney v. Gallagher*, 5 *C. E. Green* 33; *Southmayd v. McLaughlin*, 9 *C. E. Green* 181; *Farrow v. Vansittart*, 1 *Eng. Railway and Canal cases*, [*602.] The person who threatens it is not a mere stranger, without claim of right. He is one, who, under and in the assertion of a claim of right, proposes to enter upon the complainant's premises, of which the latter is in possession, and himself to secure the right of which he alleges he has been deprived. Under the circumstances, the defendant should be restrained, until his right shall have been established. His legal right is denied by the complainant. The latter insists, also, that if it existed, the defendant has, by his acquiescence, made it inequitable for him to assert it. This court can, on the hearing, determine the rights of the parties. Into the consideration of the question, the fact, character, extent and effect of the acquiescence will necessarily enter. Under the rule of this court, recently adopted, a hearing may be speedily had; and, as the right shall appear on the hearing, the court may continue the injunction, or decree a dissolution of it, unless the complainant shall restore to the defendant his rights, within such short time as the court may deem reasonable. The motion is denied. The injunction, however, will be modified, so as to permit the defendant to enter upon the complainant's premises for the purpose of raising, and if necessary, of removing the gate at the mouth of the raceway, and any other obstruction to the flow of the water which, since the filing of the bill, has been, or at any time hereafter may be, placed or constructed therein.

Neither party will have costs of this motion.

Titus and Scudder v Todd's Administrator.

**TITUS and SCUDDER vs. TODD'S ADMINISTRATOR and
ANDERSON.**

The acceptance by a creditor of a copartnership, of a note made by one of the partners in the name of the firm, after the death of the other partner, held, under the circumstances, not to discharge the estate of the deceased partner from the debt, there being no evidence from which the conclusion could be drawn, or the implication arise, that the creditor intended to discharge the estate of the deceased partner.

On final hearing on pleadings and proofs.

Mr. J. S. Aitkin, for complainants.

Mr. D. J. Pancoast, for defendant, Cooper, administrator.

THE CHANCELLOR.

The bill is filed to obtain payment out of the property of James Todd, deceased, of a partnership debt due from the late firm of S. M. Anderson & Co., which was composed of Todd and Samuel M. Anderson, to the complainants, Titus & Scudder. It alleges that Anderson is insolvent, and that fact is proved in the cause. The firm of S. M. Anderson & Co. were in business in Philadelphia for two or three years prior to April 1st, 1872, when the partnership was dissolved by mutual consent. By the agreement of dissolution, Anderson was to settle up the affairs of the concern, and was authorized to use the name of the firm in liquidation. The complainants were a firm doing business in Trenton. During the existence of the firm of S. M. Anderson & Co., the complainants had purchased goods of them on credit, and had consigned goods to them to be sold for them on commission. At the dissolution, Titus & Scudder owed S. M. Anderson & Co., about \$2500, for goods sold and delivered by the latter firm to them. At the same time, S. M. Anderson & Co.

Titus and Scudder v. Todd's Administrator.

owed Titus & Scudder for the proceeds of goods sold on commission, and had on hand unsold, merchandise which had been consigned to them by Titus & Scudder, for sale on commission. Titus & Scudder paid their debt, the last payment on account of it having been made in June, 1872. The balance of the goods consigned was sold by Anderson between the 20th of April, 1872, and the 14th of September, following. The last and final sale, which was to the amount of \$96.04, was made on the 30th of September, to the firm of Romberger, Long & Co. Titus & Scudder have not been paid what was due to them at the dissolution for the proceeds of goods sold on consignment, nor have they been paid for those sold afterwards. It appears that the course of dealing between the parties was such that Titus & Scudder received no credit for or on account of goods consigned to S. M. Anderson & Co., to be sold on commission, until the goods had been sold. Nor were the goods entered in the books of the latter firm, till then. In the meantime, a memorandum of the consignment was kept on a loose piece of paper. In May, 1873, Anderson gave to Titus & Scudder, a note for \$276.34, the amount of the indebtedness of S. M. Anderson & Co. to them for goods sold on commission. He signed the note with the firm name of S. M. Anderson & Co. Todd, however, was then dead. The note was protested for non-payment, and is produced in the cause, ready to be delivered up.

The administrator of Todd, insists that the acceptance of that note by the complainants, discharged the estate of Todd from all liability to pay the debt or any part of it. But the case discloses no intention whatever on the part of Titus & Scudder, to accept the responsibility of Anderson for the debt due them from the partnership; nor is there any evidence from which the conclusion can be drawn, or the implication arise, that they intended to discharge Todd's estate from liability to them as creditors of the firm of S. M. Anderson & Co. Anderson is one of the defendants. He was called as a witness by the complainants. He was therefore com-

Jarvis v. Henwood.

petent to testify in the cause. He says that he gave the note under the authority he had to sign the firm name in liquidation. His language is: "I gave the note in settlement of the old firm's business, as per agreement with Mr. Todd when we dissolved. I was to use the firm's name in settling the business." Under such circumstances as this case presents, the receipt by the complainants of the note referred to, would not be regarded as a bar to their claim against Todd's estate. *Harris v. Lindsay*, 4 Wash. C. C. R. 98, 271. It appears that the complainants, after the dissolution, contemplated withdrawing the consigned goods remaining unsold, and so stated to Anderson & Todd. Anderson & Todd, however, sold them and used the money in paying their partnership debts.

There will be a decree for the complainants.

JARVIS vs. HENWOOD.

Interlocutory mandatory injunction, to compel defendant, who was under covenant to repair, to repair a building, refused; it not appearing that the building was in danger from the alleged non-repair, and there being a dispute as to the liability, and it appearing that the lessor, who was complainant, had liberty to make the repairs himself, and had an adequate remedy at law.

On order to show cause why injunction should not issue. On bill and answer, and affidavits.

Mr. L. Zabriskie and Mr. T. N. McCarter, for complainant.

Mr. J. Dixon, for defendant.

THE CHANCELLOR.

The complainant moves for a preliminary injunction, substantially, to require the defendant to perform his covenant to repair certain demised premises, leased by the former to

Jarvis v. Henwood.

the latter. The premises in question are a brick storehouse in Jersey City. The building is of six stories; is four hundred feet long and fifty-eight feet high. The premises were leased to be used as a tobacco warehouse, and they have been and are now used for that purpose. The complainant alleges that the defendant has so used the building that the walls have sagged or bulged to such an extent that the building is in imminent danger of falling. He also complains that the defendant has neglected the gutters and leaders on the building, and has permitted them to get out of repair, so that the water, falling on the building, is not properly carried off, but is allowed, as the complainant believes, to sap and undermine the foundation of the building. He complains also, that the iron window shutters are being damaged for the want of paint. The bill states that the defendant has refused to enter into any amicable and specific arrangement with the complainant for saving the building from sagging or settling so as to be of no use, and has rejected the complainant's proposition to that end, and has shown a reckless spirit, as if utterly regardless of his obligation in the premises. The bill prays specific performance of the covenant to repair, an account of damages sustained by breach of the covenant, and an injunction to restrain the defendant from permitting the walls to sag, or to remain in the unsafe condition in which, it is alleged, they now are, and from permitting any other waste of the demised premises.

On the filing of the bill an order to show cause why an injunction should not be issued pursuant to the prayer of the bill, was granted. To this order the defendant responds by his answer, and affidavits thereto annexed. He admits the lease and the covenant to repair, but avers that the sagging complained of existed when the demise began, which was on the first of January, 1870, and long prior thereto; that it took place very soon after the building was erected, which appears to have been over ten years ago, and before the mortar in the walls had become dry; that the building is not in danger of falling, and is not unsafe; and that he has at all

Jarvis v. Henwood.

times discharged his whole obligation under the covenant, and has regarded his duty as a tenant. The defendant denies that he has refused to enter into any amicable or more specific arrangement in regard to repairs to the building, or shown a reckless spirit. He admits that he refused to do what the complainant proposed, but his refusal, he alleges, was because of the unreasonableness of the demand, which was, that he should sign an agreement, binding himself, unconditionally, to do whatever John M. Dodd and John Demarest should direct in regard to the building. He says that as Dodd and Demarest were wholly in the interest of the complainant, and were not, in the defendant's judgment, very discreet advisers, he insisted that he should be allowed to call in some impartial and competent architect or builder, to consult with them, and make suggestions as to a fair and reasonable course to be adopted, but the complainant refused, and there their negotiations for amicable adjustment ended. Dodd and Demarest superintended the erection of the building when it was constructed. The former drew the plans, and all the labor was employed and materials furnished through him. The defendant says, in his answer, that when he took the lease for the premises he was assured by Dodd and Demarest and the complainant, that the building would safely hold any amount of tobacco that would go into it.

There appears to me to be no necessity for applying the remedy of a mandatory interlocutory injunction in this case. The defendant not only, in his answer, declares his readiness to do all that can reasonably be required of him under the covenant, but his counsel, on the argument, declared that the defendant would, if the complainant wished him to do so, put in, at the complainant's expense, the trusses which the architect employed by the defendant to inspect the premises, testifies would strengthen the building so as to secure its safety under the weight of any amount of tobacco that could be got into it; or would permit the complainant to put them in, himself. Besides, the evidence satisfies me that the building is not in imminent danger of falling, as stated in the bill, nor

Jarvis v. Henwood.

in any danger of falling. The architect, Patrick Keely, just referred to, whose experience and standing give weight to his opinion, testifies that the building is sufficiently strong to sustain the weight now in it—sufficiently strong to be used for the purposes of a tobacco warehouse or store, and that it is certainly as strong as it has been since the lapse of two years from the time of its construction ; and that, if the building were trussed, as it could be at a cost of about \$1200, it would be able to carry all the tobacco that could be placed in the space within it. He adds, that he would have put these trusses in as part of the original construction of the building. Neil Campbell, a master mason, testifies that the building is as safe as it ever was, and that, in his opinion, it is strong enough for the warehousing business—the business for which it has been used ever since it was erected. William C. Whyte, also a master mason, testifies that he does not think that the building is in any danger, and that, in his judgment, it is sufficiently strong for the purposes of a warehouse, and is as strong as it has ever been since the walls were dry. David Ettling, a master carpenter, swears that he thinks the building is safe, now, for warehousing purposes—certainly as safe as it has been since two years after its erection. In addition to these opinions, there is the important fact that in April, 1873, Mr. Campbell was employed to lay a blue stone coping on the wall of the building, which coping was to project one foot over the wall, and that he then, not suspecting that the wall was out of plumb, stretched his line to lay the coping, and found that the wall was then about six or seven inches out of the plumb, and in the same situation in which it is now. The sag or bulge in the wall appears, by his testimony, not to have increased for now almost two years past. This fact is good evidence that there the imminent danger alleged in the bill does not exist. The witnesses, Keely, Campbell, Whyte, and Ettling, all express the opinion, giving their reasons therefor, that the sagging occurred when the walls of the building were green, and that it must have occurred within the first two years after the completion of the

Jarvis v. Henwood.

edifice. The complainant and his witnesses, Dodd and Demarest, allege that the sagging was first discovered by them in October last. They, none of them, say that it has increased since then. The bill was not filed until more than three months after the sagging was discovered. Owen Brady, who is, and for the last ten years has been, engaged around the warehouse, testifies in his affidavit annexed to the answer, that he had never observed any sagging of the walls until his attention was called to it by the examination made by Mr. Demarest last fall. This witness was, at first, delivery clerk for the complainant, while the latter was carrying on business alone in the warehouse; afterwards he was continued in the same employment there for the firm of A. S. Jarvis & Co., which was composed of the complainant and defendant, and since then, under the latter, he has been superintendent of the labor employed about the premises. I see no reason for the application of the summary and extraordinary remedy which is invoked. There is a controversy between these parties, as to whether the defendant is bound to strengthen the walls at all. He insists that the walls were in the condition in which they now are when he leased the premises, and that his covenant to repair involves him in no liability to straighten them up, or to secure the building against the consequences of defective construction, or the deflection of its walls existing at the time when the demise to him was made. He alleges, in his answer, that he is of sufficient pecuniary responsibility to answer all damages to which he may be liable for breach of his covenant. The complainant does not allege that the defendant is not responsible. He says, in his affidavit appended to his bill, that he does not know whether the defendant is a person of sufficient means to respond to the damages that would be caused to the complainant by the falling of the building, though he fears he may not be. If the suggestion of Mr. Keely, the architect, should be adopted, the entire expense of the work necessary to be done to render the building secure under the weight of all the tobacco which its capacity could contain, would be from \$1200 to \$1500.

Silver v. Campbell.

On the hearing, as before stated, the defendant's counsel declared that the defendant would permit the complainant to do that work. Indeed, there is no allegation in the bill that the defendant has ever refused to permit the complainant to do whatever he might judge or might be advised was necessary or prudent, in view of the condition of the walls. The complainant then, if the defendant refuses to strengthen the building, may himself cause the work to be done; and if the defendant is bound under his covenant to do that work, the complainant may recover damages at law accordingly. The answer denies the alleged non-repair of the leaders and gutters, and admitting that the shutters need paint, states that the defendant has proposed, and still proposes, and intends to paint them, when the weather is suitable. No waste is alleged or apprehended, as far as appears by the bill, except in the particulars above mentioned. There is, therefore, no occasion for an injunction to prevent waste, if it be refused in regard to the matters above considered.

The motion is denied, and the order to show cause discharged, with costs.

SILVER vs. CAMPBELL.

Purchasers at sales under decrees of this court, if not already parties to the suit, are regarded, to a certain extent, as parties to it, to be under the control of the court on the one hand, and its protection on the other. Such purchaser may therefore be compelled to complete his purchase in a summary way by an order upon him, without a bill, to pay the money or bring it into court.

On order to show cause why purchaser at sheriff's sale of mortgaged premises should not be ordered to complete his purchase.

Mr. Luther Shafer, for complainant.

Mr. Muirheid, for purchaser.

Silver v. Campbell.

THE CHANCELLOR.

The mortgaged premises have been twice sold under the execution issued in this cause, both times to the same person, Dr. Franklin Smith. At the first sale, he signed an acknowledgment of his purchase and paid the deposit required by the conditions of sale. He failed to pay the rest of the purchase money, and the sheriff again advertised the premises. At the second sale, Mr. Smith again purchased the property, and signed an acknowledgment of his purchase, and paid the required deposit. He has again failed to pay the balance of the purchase money. Application is now made for an order requiring him to pay that balance into this court. It does not appear that he is unable to pay it. He insists that he is at liberty to forfeit his deposit, and that the complainant's remedy in the premises is a re-sale of the property by the sheriff. He is in possession of the mortgaged premises. It appears that at the last sale, he procured another person to bid for him, and when the property was struck off on the bid of that person, Mr. Smith declared himself the purchaser, and signed the acknowledgment of the purchase and paid the deposit accordingly.

Purchasers at sales under decrees of this court, if not already parties to the suit, are regarded, to a certain extent, as parties to it, to be under the control of the court on the one hand, and its protection on the other. Such purchaser may therefore be compelled to complete his purchase in a summary way by an order upon him, without a bill, to pay the money or bring it into court. A purchaser will not be permitted to baffle the court. In this case the artifice to which the purchaser had recourse, in bidding at the last sale, is evidence of bad faith. He was probably aware that his bid would not, in view of his failure to complete his purchase at the former sale, be accepted. He therefore employed another person to bid for him. His object appears to have been to continue to hold possession of the property. He offers no reason why he should not be required to complete his purchase.

Craig v. Morris.

There will be an order, that he pay to the sheriff the balance of the purchase money in fifteen days from the time of service on him of a copy of the order to be entered in pursuance of this decision, and that he pay the costs of this application.

CRAIGE and wife *vs.* MORRIS and others.

A widow, whose dower has not been assigned, cannot be required to account for the rent of the mansion-house, although she has rented it and received rent for it. Her tenant's possession is hers.

On bill and answer, in partition.

Mr. P. L. Voorhees, for complainants.

Mr. S. H. Grey, for the widow.

THE CHANCELLOR.

The bill in this cause prays that a fair partition may be made of the real estate of Elwood Morris, deceased, among the persons entitled thereto, and if that be impracticable, the premises be sold and the proceeds divided. It seeks to charge the widow, in the division of the proceeds, with rent received by her from the premises, which appear to be a house and lot in Camden, the lot being forty feet by one hundred and fifty. It was her husband's mansion-house at the time of his death. For part of the time since her husband's death, she has rented the premises and received the rent. Her dower has not been assigned. This claim to an account is based on the proposition that the widow loses her right of quarantine, unless she personally occupies the mansion-house. Our act provides that it shall be lawful for the widow to remain in, and to hold and enjoy the mansion-house of her husband, and the mesuage or plantation thereto belonging, until her dower be

Craig v. Morris.

assigned to her, without being liable to pay any rent therefor. The estate thus given to her is not a common law quarantine of forty days, but a freehold for life, unless sooner defeated by the act of the heir. *Ackerman v. Shelp*, 3 Halst. 125; 4 Kent's Comm. 62. The estate is a continuation of that of the deceased husband. Nor is it liable to forfeiture by reason of the failure of the widow to occupy in person. She may occupy by her tenant. The possession and occupancy of her tenant is hers. The design of this, and like acts in other states, has been frequently said to be to provide support for the widow, and to coerce the heir to an assignment of her dower. This purpose would comparatively be but indifferently accomplished by the construction contended for in this case. In other states the subject has received consideration, under statutes similar to ours. In Mississippi, where the act provides that the widow shall "retain full possession, free from molestation and rent," it was held that she might hold by her tenant. *Doe v. Bernard*, 7 S. & M. 319, 324. The like construction has been put upon the Kentucky act, where the provision is, that the widow may "tarry in the mansion-house and plantation thereto belonging, rent free." *Chaplin v. Simmons' Heirs*, 7 Mon. 338; *White v. Clarke*, Id. 642; *Hyzer v. Stoker*, 3 B. Mon. 117; *Burks' Heirs v. Osborn*, 9 B. Mon. 580. So, too, in Alabama, where the provision is, that it shall be lawful for the widow to retain the "full possession, free from molestation or rent." *Inge v. Murphy*, 14 Ala. 289. In that case, the court said: "The object of the act must have been to provide a support and maintenance for the widow, until her dower should be allotted to her, on which she might enter, and having the right of possession by this statute, she is entitled to recover the rents and profits, and may hold the premises, free from molestation or rent. Nor could it have been the object of the statute to coerce her to remain in person on the premises, or rather to make her title dependent on that condition, for it may be that she could only derive a support from the premises by renting them; and to hold that the mere removing from the premises,

Hill v. Colie.

defeats this right, might, in many instances, defeat the very intent of the statute, which is a provision for the widow until her dower is set apart for her." In *McLaughlin v. McLaughlin*, 7 C. E. Green 505, it was held that a widow, who remains in the possession of the mansion-house, cannot be required to account for the rent thereof, in case she claims damages for the detention of her dower in the other lands of her husband.

The character of her estate, the source from which it is derived, and a fair construction of the language of the statute, alike forbid that the widow should be held to account to the heirs-at-law for the rent received by her.

There will be a decree accordingly.

HILL vs. COLIE and others.

Defendants obtained an extension of time to answer, on an *ex parte* application, after the expiration of the time limited by law for answering. In their answer, they set up usury. It was ordered that so much of the answer as set up usury, be struck out, or that the defendants introduce into the answer an offer to pay the principal actually received, with lawful interest.

On motion to strike out so much of the answer of defendants, Isaac W. Colie and wife, as sets up usury.

Mr. L. McKirgan, for the motion.

Mr. J. Coult, contra.

THE CHANCELLOR.

The answer of Isaac W. Colie and wife was put in under an extension of time, granted on their *ex parte* application, after the time limited by law for answering had expired. The court was not informed of their intention to set up usury.

Dinsmore v. Westcott.

They took the order extending the time, subject to such an application as the present. *Remer v. Shaw*, 4 *Halst. Ch.* 355; *Collard v. Smith*, 2 *Beas.* 43. They will not, under the circumstances, be permitted to set up the forfeiture of interest and costs, but will be ordered to strike out so much of the answer as sets up usury, or to introduce into the answer an offer to pay the amount of principal actually received, with lawful interest.

DINSMORE vs. WESTCOTT and others.

1. The warrant for sale of land for taxes, under the act "to make taxes a lien on real estate, and to authorize sales for the payment of the same," (*Nix. Dig.* 947,) must be issued to a constable of the township. There is no authority for issuing it to the collector of taxes.

2. A deed made by a collector, under a sale in pursuance of a warrant issued to him under that act, held void.

On petition for writ of assistance.

Mr. R. Wayne Parker and *Mr. Cortlandt Parker*, for petitioner.

Mr. B. Williamson, for Mrs. Sweet.

THE CHANCELLOR.

The petitioner, Edward Kemp, was the purchaser, at sheriff's sale under the execution in this cause, of the mortgaged premises. He has made due demand of possession upon Stephen Sweet and his wife, who are the persons in possession, exhibiting to them his deed from the sheriff, and they have refused to comply with his demand. Due notice of this application has been given to both Sweet and his wife. Sweet was not a party to the suit for foreclosure, although he claims

Dinsmore v. Westcott.

to have had an equity of redemption in the mortgaged premises, under a deed of conveyance, from Anthony W. Dimock and wife, for the property. Mrs. Dimock claimed title at the time of the conveyance to Sweet, under a deed from Abraham H. Schenck to her. Neither the deed to Mrs. Dimock, nor the deed to Sweet, was recorded when the bill was filed. Sweet and his wife were, therefore, under the act of 1870, (*Pamph. L.*, 1870, *p.* 40,) bound by the proceedings, and were foreclosed by the final decree. Sweet offers no defence to this application. His wife, however, claims ownership of the premises, by title paramount to that of complainant, under which the the sheriff's sale was made. The evidence discloses the fact that Sweet, in July or August, 1873, (the final decree in this cause was entered on the eleventh of September, in that year,) applied to the collector of taxes of the township in which the land lies, and requested him to cause the property to be sold for unpaid taxes assessed against Dimock in 1872, and taxes assessed against Joseph D. Higgins, a former owner of the property, in 1871. It appears by the deed from Dimock and wife to Sweet, which is dated May 1st, 1873, that the property was conveyed to the latter, subject to mortgages for \$22,500, thereon, and the interest on those mortgages, and the taxes on the property, not exceeding, for interest and taxes, \$1100. The taxes, for which he desired to cause the property to be sold, were in all \$430.40, besides interest and fees. The tax against Higgins was \$201.40, and that assessed against Dimock was \$229. The collector consented to cause the property to be sold. At Sweet's request, he published the advertisement of sale in a newspaper published in Perth Amboy, instead of a newspaper in the city of New Brunswick, in which he usually advertised such sales. Sweet gave as his reason for publishing in the Perth Amboy newspaper, (the property is situated in the township of Piscataway, in Middlesex county,) that a "bogus" mortgage had been given by Schenck upon the property, to a man who, at the time of giving it, lived in New Brunswick, but had since gone to South America, and he did not wish the owners of it

Dinsmore v. Westcott.

to find the advertisement. He said he was willing to pay the collector for his extra trouble in publishing in Perth Amboy. He arranged with the collector for the day of sale, and that the sale should take place on the premises. He told the collector he would have a man at the sale to attend to the sale for him. On the day of sale he had a person there, whom he introduced to the collector as a friend of his, from Philadelphia—a Mr. Casselbury. The collector had requested two persons to attend the sale as bidders, and expected them to be present, and so told Sweet, but the latter, he says, told him to hurry the sale, and he accordingly put up the property a little after two o'clock in the afternoon, and struck it off to Casselbury, for the term of fifty years. A little while afterwards, he says, the persons whom he was expecting arrived. The collector says that the only persons present at the sale were Sweet, Sweet's son and Casselbury, and perhaps Sweet's hired man. It appears, also, that after the sale, which took place on the 10th of October, 1873, Sweet claimed to be the owner of the property under this tax title. It is also in evidence, that when the demand for possession was made, Sweet's son, in the presence of Mrs. Sweet, said that his father had a tax title for the property, and Mrs. Sweet requested him "to be still," saying, he "might injure his father by talking." On that occasion Mrs. Sweet made no claim to the property, but said, in answer to the demand for possession, that the whole affair was the business of her husband, and that she knew nothing about it. The deed to Casselbury bears date October 30th, 1873. Mrs. Sweet now claims that she has had possession of the property since the 3d of March, 1874, under a deed from Casselbury and wife to her, of that date. It is manifest that this sale to Casselbury was a mere contrivance to enable Sweet to keep possession.

The deed to Casselbury was made by the collector, in pursuance of a warrant issued to him by the township committee, on the 6th of August, 1873. The second section of the act "to make taxes a lien on real estate, and to authorize sales

Dinsmore v. Westcott.

for the payment of the same," approved March 17th, 1854, (*Nix. Dig.* 947,) provides, that any assessment of taxes made in this state, against any person or persons residing out of this state, or "foreign corporations residing out of the county in which the land is located," on account of any lands, tenements, hereditaments, or real estate of such person or persons, or corporation, shall be and remain a lien on all the lands, tenements, or real estate, on account of which the assessment shall be made, with lawful interest thereon accruing, and all costs and fees in relation to said assessment and collection thereof, for the space of two years from the time when the taxes so as aforesaid assessed were payable. The third section directs that in case any assessment of taxes, as specified in the second section, together with the interest thereon and the costs, shall remain unpaid for the space of one year after they were payable, then, and in any such case, it shall be lawful for the township committee, or a majority of them, to issue their warrant, under their respective hands and seals, directed to any constable of the township, therein and thereby commanding him to make said taxes, with the interest and costs and fees, of the lands, tenements, hereditaments, or real estate on account whereof the same were assessed, by selling the same, or any part thereof, as will be sufficient for the purpose, for the shortest time for which any person or persons will agree to take the same and pay the taxes, with interest, and all costs, fees, charges, and expenses, &c. By a supplement to that act, approved March 25th, 1863, (*Pamph. L.*, 1863, p. 497,) it is provided that the lien and liability to sale are extended to the lands, tenements, hereditaments, and real estate of all persons and corporations. That supplement authorizes the township committee to proceed to the collection by warrant, according to the original act, after the tax shall have remained unpaid for four months. By a further supplement, approved March 26th, 1873, (*Pamph. L.*, 1873, p. 63,) it is provided that the real estate of any person or persons residing in this state, or any corporation of this state, may be sold for taxes in the same manner as real estate of persons residing out of this state, or foreign corporations located outside of the county

Dinsmore v. Westcott.

in which the land is located, was then sold for taxes. The supplement of 1863 had, however, already made such provision ; and that act appears to have been unrepealed. It will be seen that, by the terms of the original act, the warrant is to be directed to a constable of the township. There is no authority, under any of these acts, for directing the warrant to any one else. The twenty-ninth section of the "supplement to the act concerning taxes," approved April 11th, 1866, (*Nix. Dig.* 951,) is relied upon as authority for directing the warrant to the collector ; but that section refers only, by its terms, to warrants issued for the collection of delinquent taxes, by virtue of "the act concerning taxes," and cannot be held to refer to the act above quoted. Its language is : "The warrants hereafter issued for the collection of delinquent taxes in the townships, boroughs, cities, districts, or wards of this state, *by virtue of the act to which this is a further supplement*, shall be directed and delivered to the collector of the township, borough, city, district, or ward ; and the said collector shall, in the execution of said warrant, have the same powers, and perform the same duties, be subject to the same forfeitures, and receive the same compensation, as is prescribed to the constables by the provisions of the *aforementioned act* : *provided*, that this section shall not apply to any city, borough, township, town, or district having special provision inconsistent herewith." The limitation of the charge provided for in this section, to proceedings for collection of delinquent taxes under the "act concerning taxes," is the more clear from the language of the tenth section, which directs the assessor, in all cases where real estate is taxed to any person from whom he has reason to suppose it may be difficult to collect the tax by warrant against his goods, chattels, and person, to add to his duplicate, by way of appendix, or otherwise, a designation of the real estate, by such short description as will be sufficient to ascertain the location and extent thereof, to the end that the tax "may be collected in the manner prescribed by the act entitled 'an act to make taxes a lien on real estate, and to authorize sales for the payment of the same, approved March 17th, 1854.'" The warrant, therefore, was a nullity, and

Elmer v. Loper.

the deed to Casselbury conveyed no title. *Carron v. Martin*, 2 *Dutcher* 594. It may be added, that the views expressed by this court, (by Chancellor Green) in *Hopper v. Executors of Malleson*, 1 *C. E. Green* 382, are fatal to this defence, if the deed were valid. The special law under consideration in that case, was identical in its terms as to the estate to be acquired by the purchaser, with the general act making taxes a lien on real estate. It was there held that a deed under a sale for tax by virtue of that special act, while it conveyed the estate of the owner against whom the tax was assessed, and all persons claiming under him, until the end of the term, was of no effect against the holder of a mortgage existing on the premises at the time of the assessment. The complainant's mortgage for \$7000, in the present case, was given in the year 1868, and the mortgage by Higgins to Westcott, in 1870.

The prayer of the petition will be granted.

ELMER, trustee, vs. LOPER and others.

1. *Cestui que trust* should be joined with trustee in a suit for the recovery of property belonging to the former.

2. Where *cestui que trust* was made a defendant in such a suit, an amendment was ordered at the hearing, striking him out as defendant and making him a complainant.

3. A mortgagee in possession will not be allowed compensation for his trouble in taking care of the estate.

4. A trustee who brings into court an account of his dealings with the trust estate, manifestly unworthy of credit, is not entitled to compensation for his management of the trust property.

5. Where a mortgagee or trustee has so intermingled the trust property with his own, that it is impracticable to ascertain how much of certain charges, such as taxes levied upon the whole property, ought to be borne by the trust estate, he is entitled to no allowance in respect to such charges.

6. Directions for taking an account between mortgagor and mortgagee in possession.

Elmer v. Loper.

On final hearing on pleadings and proofs.

Messrs. Potter and Nixon, for complainant.

Mr. F. F. Westcott, for Loper.

THE CHANCELLOR.

Charles Garrison, deceased, late of the county of Cumberland, in this state, by his will, proved in 1843, gave to Lucius Q. C. Elmer, one of his executors, \$4000, in trust, to put and keep that sum at interest and pay the interest annually, after deducting \$20 a year for his compensation, to the testator's adopted son, Charles Garrison Ireland, one of the defendants in this suit, until he should arrive at the age of forty years, and then to pay the principal to him. There was also a residuary bequest of personal estate to Ireland. The testator, also, by the will, after devising a certain farm to Lydia Tice, gave all the residue of his land and real estate to Ireland and the heirs of his body; Ireland, during his lifetime, to use the same and cut the wood and timber as if he were the owner of it in fee simple. In 1852, Ireland, being in want of money and being pressed by a judgment creditor, one Otterson, applied to the defendant, Dr. James Loper, for pecuniary aid in the premises. The latter, at that time, held a mortgage for \$400 and interest, given to him by Ireland, on part of the property, the Deerfield farm, devised to the latter by the above mentioned will; and on the same property, one J. C. Drake also held a mortgage for \$325.65, besides interest. Ireland was also indebted to Loper in the sum of \$200, which the latter had lent him. The result of Ireland's application to Loper was the following letter, written by the latter to the former, and dated December 13th, 1852: "I am at a loss to know what to say to you in regard to our business. I find upon examination, that the debts bearing on your property, exclusive of McIwall's, will amount to something over \$2300. The money you owe Drake will have to be secured by me, in case you make me a deed of trust

Elmer v. Loper.

according to my proposition. That, of course, will be the great *sine qua non* of the transaction. My proposition to you will be, to add to Otterson's debt and cost, my own debt and per centage, according to my first arrangement with you (or rather your own arrangement with me,) add Drake's amount of debt and cost, tax, life insurance, &c., and give me a deed for all your property and pay me twelve per cent. for the whole amount of the debt, &c., until paid off. Every cent that I can collect from the proceeds of your property, shall strictly be kept and applied to your own account, after deducting my interest, tax, &c., which you know will necessarily have to be paid. You will readily perceive that all these bills will amount to something over \$276, much more than the rent of the Deerfield farm, together with what small amount of rent can be made at Millville; therefore, I see no other way than for you to order paid to me, the money from Elmer, otherwise there will not be enough paid to me to keep the debt from accumulating in my hands. Now, I want you to think of the matter, and if you can do any better than I offer, to do so, for that is the best that I can do, and even that I would rather not do. I can get as good as that for my money and have the assurance that it will be paid to me at any time, on three months' notice. If you accede to my proposal, you can get your life insurance for the above amount, and bring it down, together with your deeds, &c., and I will draw the new ones to me, at my leisure time. I can do it as well as any one and save cost." This letter was followed by an agreement, under seal, made between Loper and Ireland, whereby it was witnessed that the latter, for the consideration of \$2364.25, conveyed to the former, by deeds of even date with the agreement, ten different tracts or pieces of land, with all the improvements thereon, together with all the lands belonging to Ireland in this state, and that Ireland covenanted and agreed with Loper, his heirs and assigns, that Loper should peaceably hold and use those lands, together with all the improvements thereon, the same as if the lands were, to all intents and purposes, his, and to remain his for-

Elmer v. Loper.

ever ; that all the rents, profits and interest arising from the proceeds of the lands, were to be appropriated to the payment of the above mentioned debt, after deducting the necessary taxes, repairs and life insurance, and twelve per cent. interest for the use of the money. And Ireland thereby agreed to pay or order to be paid to Loper, all the interest due and becoming due yearly on \$4000, then in the hands of L. Q. C. Elmer, after deducting Mr. Elmer's fee of \$20 a year, and the tax on the sum, and that he, Ireland, would not do, or at any time cause to be done, anything to prevent Loper from collecting the interest, under penalty of forfeiture of the whole lands. And Loper thereby agreed to apply the residue, after the above deductions should have been made, to the payment of the above mentioned debts, until all of those debts should be paid off, unless Ireland, his heirs or assigns, should well and truly pay to Loper the whole amount before those debts should have been paid by such application. And it was thereby declared that he or they should have a right to pay off the debts at any time. And it was thereby further agreed that whenever the sum of money therein above mentioned, should have been paid, together with all the expenses of tax, life insurance, interest, repairs, &c., then the above mentioned deeds of conveyance as well as all possession, should be at once given up to Ireland, his heirs and assigns. At the time of executing this agreement, Loper produced to Ireland, the following statement of the indebtedness which the arrangement was intended to secure :

Charles G. Ireland in account with Dr. James Loper.

December 24th, 1852.

Mortgage on Deerfield farm.....	\$400 00
2½ p. c. per mo. int. from Oct. 5th, 1851, to Dec.	
24th, 1852.....	146 64
Cash, borrowed on lease of J. Casper, assigned to	
J. Loper.....	100 00
2½ p. c. per mo., with 6 p. c. per an. added, from	
Aug. 22d, 1851, to Dec. 24th, 1852	48 00
Cash borrowed on lease, as aforesaid.....	100 00

Elmer v. Loper.

2½ p. c. per. mo., with 6 p. c. per an. added, from Sept. 16th, 1851, to Dec. 24th, 1852.....	\$46 00
Principal and interest of Otterson's claim to Dec. 24th, 1852.....	1,144 30
Sheriff's cost, as far as heard from.. ..	31 40
	<hr/>
	\$2,016 34
Mortgage on Deerfield farm to J. C. Drake.....	325 68
Int. from April 16th, 1852, to Dec. 24th, 1852, 8½ months.....	13 52
	<hr/>
	\$2,355 54
Tax on C. G. Ireland's property in Millville town- ship, for the years 1851-52	36 75
	<hr/>
	\$2,392 29
Cash received of J. Casper.....	28 04
	<hr/>
	\$2,364 25

Simultaneously with the execution of the agreement, Ireland executed and delivered to Loper three deeds, purporting to convey to him, in fee simple, the land devised to Ireland by the will above mentioned, and he also then executed and delivered to Loper a letter of attorney, authorizing and empowering him to demand, sue for and receive for Ireland and to his use, all debts, dues and demands whatsoever, which were due, and owing to Ireland, or which might become due to him at any future day, or which then, of right, belonged to him, or which, at any future time, should belong to him. Under this arrangement Loper entered into possession of the real property described in the deeds, and, from thence until the filing of the bill, took to his own use the rents and profits thereof. He also sold wood, timber and hoop poles off the premises, and applied to his own use the money received therefrom. He also collected the interest on the legacy of \$4000, up to the time when Ireland attained to the age of forty years, when the latter became entitled to the principal. Besides the money mentioned in the written agreement, Loper,

Elmer v. Loper.

subsequently to the making of that instrument, advanced various sums to Ireland, which were to be repaid out of the principal of the legacy of \$4000. Of the principal of that legacy Loper received \$1000, on 7th of December, 1860, and \$620 on the 8th of April, 1861. Ireland, on the 3d of November, 1871, executed a deed conveying the lands, which had been conveyed to Loper, to the complainant, Elmer, in trust to take proceedings to obtain an account and settlement from Loper, and payment of the money justly due Ireland from him, and a conveyance of the lands to Elmer for Ireland's benefit. The trust is set out in the bill. The bill is filed by Elmer, as trustee, against Loper and Ireland. It prays an account from Loper, and conveyance to Elmer, as trustee of the lands conveyed by Ireland to Loper.

It is insisted by the counsel of Loper that this action cannot be maintained by Elmer alone, and that Ireland should have been joined with him as complainant. This objection was made, for the first time, at the hearing, and after the merits of the case had been disclosed. It cannot prevail. Ireland is a party to this suit. No relief is prayed or sought against him. The suit is prosecuted for his benefit. He has not answered, but was a witness for complainant. He was present at the hearing. He should have been made complainant with his trustee. The complainant will be permitted to amend by making him a party complainant, and striking out his name as defendant. *Malin v. Malin*, 2 Johns. Ch. R. 238; *Kirk v. Clark*, *Prec. in Chan.* 275.

The conveyance, by Ireland to Loper, was manifestly merely a mortgage to secure to the latter the money mentioned in the written agreement, with the interest thereby made payable. It is claimed by Loper, and I think with reason, that, by the subsequent verbal agreement of the parties, the conveyance was to stand as security for the subsequent advances. The complainant is entitled to the account for which he prays. Loper insists that in the account he is to be allowed reasonable compensation for his trouble in taking care of the mortgaged premises, collecting the rent and superintending

Elmer v. Loper.

repairs, etc., and he testifies and produces another witness to the same point, that it was agreed between him and Ireland, that he should have, for such compensation, a sum equal to six per cent. a year on the amount of his debt. The agreement under seal makes no provision for compensation. It does provide for the payment, by Ireland to Loper, of interest at the rate of twelve per cent. per annum on the mortgage debt. Loper attempts to show that this was a mistake, attributable to his want of knowledge of language, or of the appropriate use of terms, and that the intention of the parties was, that only six per cent. interest should be paid, and that the rest of the twelve per cent. was to be his compensation. But, in the first place, the agreement is clear and explicit in its language, and parol evidence cannot be received to explain it. The language is, "twelve per cent. interest for the use of the money." There is no evidence of any mistake, whatever, on this head. That the agreement between Ireland and Loper was, that the latter should receive twelve per cent. per annum for the mortgage debt, is unquestionable. In his letter of December 13th, 1852, written only a few days before the date of the agreement, Loper expressly and explicitly makes it part of his proposition, that Ireland shall pay him twelve per cent. for the whole amount of his debt, until it should be paid off. The statement given by him to Ireland, at the time of the execution of the agreement, throws some light on this matter. He there charges thirty per cent. a year on the mortgage he held on the Deerfield farm, and thirty-six per cent. a year on the other money lent by him to Ireland, up to the date of the agreement. He had not then been in possession of the property, nor had he had any charge or care of it. He does not deny that he made this statement, and delivered it to Ireland. Nor does his statement, appended to his answer, of the indebtedness existing at the time the agreement was made, wherein he charges interest at the rate of six per cent. per annum, only give color to his version of the affair; for the amount of the indebtedness, according to the statement just referred to, was, on the day of the date of the agreement,

Elmer v. Loper.

\$2168.56, whereas the agreement, drawn by Loper himself, states it \$2364.25 ; and the difference between the two arises from the difference in the rates of interest charged. It is too obvious from the testimony, for further remark, that the agreement between the parties was for the payment of interest by Ireland at the rate of twelve per cent. per annum on the debt. But the court will not allow a mortgagee in possession compensation for his trouble in taking care of the estate, even though there is an agreement between him and the mortgagor, that he shall have such compensation. *Clark v. Smith, Saxt.* 121, 137 ; *Vanderhaise v. Hugues*, 2 *Beas.* 410 ; *Coole on Mortgages* 343, 365. There is an especial reason why Loper should not have compensation. It was his duty to keep a just and faithful account of his receipts and expenditures from, and upon, the mortgaged premises. The book of account, which he produces as that in which he has kept the account, is not only utterly unworthy of credit, but is, of itself, strong, if indeed it is not conclusive, evidence of fraud on his part. It contains no other account. It abounds in material alterations, apparently arbitrarily made, in his own favor. Charges against Ireland have been largely increased, by alterations of figures, on almost every page. A trustee who produces before the court such an account of his dealings with the trust estate, has forfeited all claim to compensation.

His account, appended to his answer, is made up with annual rests as against Ireland. He is not entitled to such rests. He should annually have applied the surplus of the receipts over his disbursements, to the payment of the interest due him on his debt, and if it were more than sufficient to answer that purpose, he should have credited the excess on the principal. If, in any year, his disbursements had exceeded his receipts, the amount of the deficit should have been added to the principal of his debt. That he did not advance to Ireland all the money charged in his account as loans, is clear. Ireland specifies twenty-seven instances in which the receipts given by him to Loper for money loaned, exceed (in many cases, very largely,) the amounts really advanced. The

Elmer, v. Loper.

aggregate of these excesses is \$1632.13, not including the transaction in reference to the watch. Loper does not, in fact, deny the charge. He says that he cannot tell what Ireland received on any of the receipts which he, Loper, produces as evidence of loans. As to the amount of some of these receipts, (no other evidence of indebtedness was given for the loans,) he claims that no inquiry can be made in regard to them, because he alleges that, by agreement between him and Ireland, \$1620 of the principal of the legacy of \$4000 were appropriated to the payment of the debts represented by them. The proof of this alleged appropriation rests wholly on the testimony of Loper himself, which is wholly uncorroborated, except by the endorsements on the receipts which he claims to have made when the \$1620 were paid to him. These are in his handwriting, are not signed by anybody, and are merely acknowledgments of payment of the amounts mentioned in the receipts. It is noteworthy, however, that Loper retained in his possession, these very receipts which were the evidences of the indebtedness, and he now produces them to the court. Why did he not deliver them up to Ireland when payment of the amount they represented had been made? He testifies that Ireland paid him the money in his, Loper's, office. His counsel argues that strong moral corroboration of Loper's testimony on this subject, is to be found in the entries of the receipts of the \$1620, in the account books above mentioned, wherein the two sums of \$1000 and \$620 are entered under the date when each was received, as "returned." The moral weight of these entries, however, is against Loper, for the addition of the word "returned," appears to have been the result of an afterthought. In one of the entries, it is written over an erasure, and in the other, it was obviously inserted after the entry had been made. The proof of the specific appropriation of the \$1620 to the payment of the indebtedness represented by the receipts, is by no means satisfactory. Loper will be allowed the amount actually received by Ireland when the receipts were given and no more, with lawful interest thereon. The complainant's

Elmer v. Loper.

counsel insists that Loper ought not to be allowed any payments on account of taxes assessed against the mortgaged premises, because he gave in the property to be assessed as his own, and it was therefore taxed with his property, so that, as they contend, it is now impossible to say what is the amount assessed in respect of the mortgaged premises. If it prove to be impracticable to ascertain what taxes Loper has paid, in respect of Ireland's property, in any year, he should have no allowance for taxes for that year. It was his duty to have had the mortgaged premises assessed separately. His charges for taxes paid in his book of account, will be no guide in this matter. They are utterly unworthy of credit. Every one of them, from 1861 to 1872, with the exception of the years 1868 and 1869, has been altered, some of them in such a manner as to increase, apparantly entirely arbitrarily, the charge against Ireland, and others in such a manner as that it is impossible to discover what the figures originally were. Loper is to be allowed for all proper disbursements, and is to account for all his receipts. He is to be charged interest for any money received by him over and above his expenditures for the mortgaged premises, after his debt was paid off, and there will be annual rests as against him in such case. He is to account, not only for the rents, issues and profits received by him from the mortgaged premises, but also, for such as he reasonably might and ought to have received. If his account, appended to his answer, be restated according to the principles above indicated, it appears that his debt, allowing him in respect of his loans only so much as he actually advanced, but allowing his charges in other respects, was, with all lawful interest thereon, paid off at the end of 1867, and there was then a balance against him which, at the time of filing the bill, had increased to about \$1500. In this calculation the \$175 claimed by Loper in the transaction in regard to the watch, is allowed him for the purposes of the calculation. In the account, however, he is to be allowed only the amount paid him at Ireland's request to redeem the watch and chain, \$63, with lawful interest from the time of

Warnock v. Campbell.

making the loan. The retention or loss of the chain by Loper will fairly offset the amount, \$5, agreed to be paid by Ireland for Loper's services in redeeming the property. Ireland is entitled to a credit of \$58.87, paid by him to Loper on account of the transaction. It is evident that Loper charged Ireland \$100 premium for advancing the \$63, and exacted of him an agreement to pay interest at the rate of twelve per cent. per annum, for the amount of the loan and premium, and the \$5 which Ireland was to pay him for his services. It appears, also, that Loper advanced on the mortgage on the Deerfield farm, only \$368. In the account, that sum is to be taken as the principal of that mortgage.

Loper will be decreed to convey the mortgaged premises to the complainant in trust for Ireland, on the trust set forth in the bill of complaint, and there will be a reference to a master to take and state the account.

WARNOCK vs. CAMPBELL.

1. Equity will relieve against a conveyance made without consideration, and when the grantor, through intoxication, was, to the grantee's knowledge, not himself. But, under the circumstances, complainant not entitled to costs.

2. Taxes paid by the grantee, with interest from time of payment, must be repaid to him.

Mr. Gilhooly, for complainant.

Mr. S. D. Haines, for defendant.

THE VICE-CHANCELLOR.

The principles applicable to the relief asked for in this suit were laid down and applied in *Hutchinson v. Tindall*, 2 *Green's Ch. R.* 357. They were there expressed as follows :

Warnock v. Campbell.

A court of equity will hear a party who seeks relief against his own act, on the ground of intoxication, though formerly such hearing was denied. To avoid a contract on the ground of intoxication, it must be shown either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. If a person, while in a state of intoxication, though not induced by the act or procurement of the grantee, execute an absolute conveyance of his property, without consideration, equity will relieve against the conveyance.

The complainant, Warnock, was a single man, employed in a factory in Elizabethport. He was the owner of a lot of land there, and had accumulated a little money. Generally speaking, he was steady and industrious, but had occasional sprees. The deed of conveyance which he now seeks to be relieved against, was executed on the 25th of August, 1871, and, I am entirely satisfied, was executed while he was disordered by one of these fits of intemperance. The testimony of the justice of the peace who drew up the deed and took the acknowledgment of it, does not show that the complainant was grossly, or very manifestly, intoxicated, when the deed was directed to be made, or when it was signed. But his testimony, as well as that of the grantee, fails to overcome the testimony of the physician who visited him shortly after, and found him in a disabled condition, evidently induced by excessive indulgence in liquor. The complainant and defendant went together to the office of the justice where the deed was executed, and the two went away together, taking the deed with them. The premises conveyed consisted of a lot worth, at that time, \$500 or \$600, and now worth more. The consideration named in the deed, was \$5, but nothing was, in fact, paid by Campbell, the grantee. He says he took the lot because Warnock was giving away his property, and if the deed had not been made to him, it would have been made to some one else. He was a relative of Warnock by marriage. It does not appear distinctly, if at all, from

McFarland v. Gilchrist.

the evidence, that the intoxication of Warnock was induced by any act or connivance of Campbell. But the latter very well knew that Warnock was not in a sound mental state—not himself—when he conveyed this lot to him for no consideration. He calls it sometimes, in his testimony, a sale ; but the particulars he gives of the transaction, abundantly show that it was no sale at all. The bill was filed on the 5th of October, 1871. If the defendant had not been willing, or had not purposed to take an undue advantage of Warnock's temporary aberration, he would have re-conveyed the premises before the filing of the bill. What application, if any, was made to him for that purpose before suit, does not appear from the proofs. The testimony on both sides, taken before the master, is voluminous, and unnecessarily extensive. I think this circumstance is entitled to some consideration in regard to the costs, and taking it in connection with the fact that the complainant is to blame for his drunkenness, and that the consequences of his own bad conduct are now sought to be avoided, my judgment is that, while entitled to a decree for the restoration of his property, he should recover no costs. He should also refund to the defendant the sums paid by the latter for taxes on the lot, with interest from the time when respectively paid.

I will advise a decree as above.

McFARLAND vs. GILCHRIST and others.

1. A mortgage given by a husband and wife, in trust for the wife, to secure to her money alleged to have been loaned by her to her husband out of her separate estate, held to be a lien on the mortgaged premises, in the hands of an assignee for value, subsequent to a junior mortgage by the same parties.

2. The assignee, in such case, has no higher equity against the junior mortgagee, than the trustee and her *cestui que trust*.

McFarland v. Gilchrist.

Mr. A. T. McGill, for complainant.

Mr. Fleming, for defendant, Walker.

THE VICE-CHANCELLOR.

John A. Faulkner and Jesse his wife, made their mortgage of August 20th, 1870, for \$3400, to Mary Dixon, in trust for the said Jesse. They allege it to have been given to secure to the latter moneys lent by her to her husband, several years before, out of her separate estate. It was put on record August 31st, 1870. On the 20th of September, 1870, they made another mortgage to Peter Walker, for \$3200, which was put on record September 23d, 1870.

By an assignment of July 20th, 1871, Mary Dixon transferred the mortgage given to her to William W. McFarland (Faulkner and wife consenting thereto) to secure the sum of \$2500. The bill of McFarland, the complainant, is to foreclose this mortgage. Peter Walker, in his answer and cross-bill, attacks the mortgage to Mary Dixon as voluntary, without consideration, and void as to creditors.

The only doubt I have had as to what decree should be made in the case, has been upon the question whether, under the circumstances disclosed by the evidence, McFarland stood upon better ground, in respect to Walker's mortgage, than Mrs. Dixon, or her *cestui que trust*. I am clear that he does not. The rule that a mortgage is taken by an assignee, subject to all equities against the assignor, is applicable in this case. Under the evidence, the mortgage given to secure Mrs. Faulkner, cannot be held to be good in Mrs. Dixon's hands, against the mortgage of Walker. The latter mortgage is a prior lien. Her mortgage was assigned to McFarland to secure a debt due him from her husband, and the assignment gives McFarland no higher equity, as against Walker, than the equity of Mrs. Dixon and her *cestui que trust*.

I will advise accordingly.

Meigs v. Lister.

MEIGS and others vs. LISTER and others.

An injunction, issued on bill and answer, restraining the defendants from carrying on their business in specified ways, was, after the lapse of a year, modified without opposition on part of complainants. Under the modified injunction, the business was carried on for another year, when the cause was brought to hearing upon the evidence. The proof being held to be insufficient to justify a decree putting an end to the defendants' business, the cause was ordered to stand without final decree, with permission to either party to apply for leave to produce additional proofs, or to be heard anew. Meanwhile, neither party to pay costs to the other.

Mr. C. H. Winfield, for complainants.

Mr. Leonard and *Mr. Wild*, for defendants.

THE VICE-CHANCELLOR.

The bill in this suit was filed on the 13th of May, 1872, by Henry Meigs and others, residing in or near to Bayonne, on the east side of Newark bay. Its object was to restrain the defendants from carrying on the business then conducted by them on the opposite or west side of the bay, at a point known as Maple Island Creek. The business was charged to be a nuisance. It was that of an establishment for drying bones, rendering matter and refuse animal matter generally, brought there from the city of New York and other places. On the 10th of June, 1872, the defendants filed an answer, and upon the bill, answer and affidavits, the case was argued before the late Chancellor Zabriskie, whose opinion is reported in 8 *C. E. Green* 200. In pursuance of this opinion, an injunction was issued, restraining the defendants from carrying on the business of drying or burning the offal, bones, refuse and other animal matter at said place, and from pursuing any other business or process whereby smells, stenches, smokes, vapors or gases are generated, on the point of land

Meigs v. Lister.

where said establishment was situated, or anywhere about or near thereto, and from carrying offal, bones and other animal matter, which emit smells, loosely in boats, or in boats in barrels or other vessels, without water and air-tight heads, or carrying empty barrels or other vessels in said boats, which have been filled with bones, offal and other animal matter, without water and in air-tight heads, through Newark bay or the Kill Von Kull, near the complainants' dwelling-houses.

The injunction, as above issued, continued in force till August 8th, 1873, when it was modified by an order of this court, made without controversy or opposition from the complainants. By such order, the defendants were at liberty to prepare and manufacture into fertilizers the bones, tissues and other animal matter then on their premises, and remove the same therefrom, and to carry on, on said premises, the business of manufacturing fertilizers from bones, tissues and other animal matter, in such manner as not to generate any unwholesome or offensive smells, stench, smokes, vapors or gases.

Under the injunction so modified, the defendants went on till in the fall of 1874, when, upon the motion of the complainants, the cause was brought to hearing upon the testimony of witnesses given orally before me. It is now insisted for the complainants, that the defendants have not conformed their business to the requirements of the modified injunction, and that the business, as conducted through the summer of 1874, was a nuisance, the continuance of which ought to be enjoined.

A considerable amount of testimony has been taken on both sides. The result of it is not sufficiently clear and satisfactory to justify a decree putting an end to the business of the defendants, conducted at Maple Island Creek. I think the preponderance of the testimony is against such a decree rather than in favor of it. But while this is so, my judgment is that the suit should be held open, for the purpose of enabling the complainants and the public of that vicinity to test the true nature or character of the defendants' establishment

Gillette v. Ballard.

in controversy, by further observation and experience of it. The proofs as they stand may be hereafter used, if desired, in connection with others, if other proofs should hereafter be found to arise. The public and important character of the question involved in the suit, justify the further holding of it for this purpose, and I shall therefore advise that the cause be ordered to stand without final decree, and that either party may hereafter apply for leave to produce additional proofs, or to be heard anew. Neither party, meanwhile, to pay costs to the other.

GILLETTE vs. BALLARD.

1. Usury will not be inferred when the opposite conclusion can be reasonably and fairly arrived at.

2. To sustain such a defence it must be shown that there was a *usurious agreement*.

3. The chattel mortgage in this case *held* not to be usurious in view of the nature of the whole transaction.

Mr. McCarter, for complainant.

Mr. Coult, for defendant.

THE VICE-CHANCELLOR.

The complainant's suit is to impeach a chattel mortgage made by himself to the defendant. The mortgage is for \$5000, and covers the furniture and fixtures of the Continental Hotel, in the city of Newark. It was executed in the month of June, 1873, though the money had been advanced by the defendant early in 1871, to help the complainant in the purchase of the furniture and fixtures, and in taking charge of the hotel. In November, 1873, Ballard began proceedings for the collection of the mortgage debt, and Gillette filed his bill for relief, alleging that the loan was

Gillette v. Ballard.

usurious, praying for an account, and offering to pay whatever should be found due. An injunction was issued restraining a sale under the mortgage, and having now heard the cause upon the pleadings and the oral testimony of witnesses, I must advise that the complainant's case has not been established, and that his bill should be dismissed, with costs.

The case presented by the bill is, in brief, that being the proprietor of a hotel in Buffalo, he was induced by Ballard to give up that business, and become the purchaser of the furniture of the Continental Hotel, in Newark; that not having sufficient capital himself for the purchase, Ballard proposed to lend him \$5000, on condition that Gillette would furnish board at the hotel for Ballard, his wife and two children, as a compensation for the use of the money so loaned, Ballard at the same time alleging, that as occasions might require, he would advance such additional sums as might be needed to enable Gillette to carry on the business; that Ballard did, in fact, advance the \$5000; that he boarded with the family, as above mentioned, at complainant's hotel, from the early part of 1871 to the latter part of 1873; that although Ballard rendered, from time to time, aid and services in the business, and although Mrs. Ballard officiated more or less as the female head of the house, having the care or supervision of it, yet that the value of such aid and services, together with the lawful interest of the \$5000, was not enough to compensate for the board and entertainment which Ballard and his family received. The bill prays that Ballard be decreed to account, that he be credited with the fair value of his own services, and the services of his wife, and charged with the fair price of the entertainment and board. It alleges that upon such accounting, a balance will be due himself, but if due to Ballard, the complainant offers to pay it when ascertained.

The suit can stand, only on the ground that there was a usurious *agreement*. The evidence does not at all warrant, in my judgment, the conclusion that there was. I think the true nature of the transaction was essentially different, and

Gillette v. Ballard.

that the loan of money was but one feature of an arrangement for the taking and carrying on of the business of the hotel, an arrangement by which Gillette, who was unmarried, was to become the proprietor, and Ballard and wife to live with him and co-operate in making the enterprise a success. It was meant and expected to be an arrangement of a friendly and confidential nature, equally advantageous to both. They were intimate friends. Gillette had been a few weeks before visiting at Ballard's house in Newark, and while there the subject of the hotel had been suggested, and also a partnership in it between Ballard and himself. He returned to Buffalo, leaving Ballard to make further inquiries and report. On the 17th of December, 1870, Ballard sent him a letter, which is an exhibit in the case, and is relied on to establish the usurious bargain. After mention made of the terms on which the hotel could be obtained, the letter goes on as follows: "As to my going into the thing as a partner, why I would rather not do so. I am satisfied that there is a splendid chance for one to make money out of it, but it would not be as well for either of us to split it up and divide the profits. I'll tell you what I will do. I will lend you \$5000 without interest, and will aid you in every way possible; will attend to your finances and books, and help you all I can, if you will give me my choice of rooms, and board for myself and family. And if it also becomes necessary to get more furniture for other rooms, (and of course it will,) why, I'll go security for them; in fact, you know enough of me, to know what I would do for you when required; this, I think, will make much more money for you than if I was a partner. Don't look at this in anything but a business point of view, and decide according to your convictions."

In this letter the part to be performed by Ballard's wife is not specified, but it was understood between the parties, and in view of the evidence and facts of the case, may be regarded as comprehended within the general promise it contains to give aid in every way possible. There can be no doubt that her part was meant to be, as it afterwards became, a material ele-

Gillette v. Ballard.

ment of the arrangement. In pursuance of these terms the hotel was taken and carried on. Efficient and valuable services of different kinds were rendered by Ballard. His wife, who was known to Gillette to be especially qualified to act as the female head of the establishment, did so act, and is proved to have done it well.

In the summer of 1873, Gillette was married and went to Europe for some weeks with his wife. On his return, the supervision of Mrs. Ballard became less requisite, and the general arrangement was ended. To Ballard's call for the principal of the loan, the charge of usury was for the first time suggested by Gillette. In view of the evidence, I think it would be a gross misconstruction to treat this transaction as a cover or device for the taking of illegal interest. If the transactions were less mutually advantageous than the proofs show it to have been, the inference of a usurious design would be still inadmissible, because such an inference will not in any case be made when the opposite conclusion can be reasonably and fairly arrived at. But the arrangement was highly advantageous to Gillette, indispensable to his undertaking the business, so far as the loan was concerned, and very conducive to its success, so far as the aid and services of the other parties were involved. It was, to some extent, a partnership, calling for friendly and confidential relations. Having derived from it the benefits which it was fitted to give in virtue of that character, the complainant cannot now ask this court to transform it into a relation of another description, and assign market prices to board and to services which were appraised by himself, on a different principle and with a different aim. To do so would be in accordance neither with legal principles nor with right.

I will advise a decree as above.

Union National Bank v. Pinner.

THE UNION NATIONAL BANK OF RAHWAY vs. PINNER.

In a suit to foreclose a purchase money mortgage, the mortgagor and grantee in the conveyance, is entitled, by virtue of the covenants against encumbrances therein contained, to have the amount of tax liens outstanding on the mortgaged premises deducted from the amount due on the mortgage, and a decree taken only for the balance. And the assignee of such mortgage holds it subject to the same equity.

Mr. Shafer, for complainants.

Mr. Kirkpatrick, for defendant.

THE VICE-CHANCELLOR.

The two mortgages which this suit is brought to foreclose, were made by Moritz Pinner to Henry B. Crossett, by whom they were assigned to the complainants. They are dated November 19th, 1870, one for \$4700, and one for \$3000. They were given to secure part of the purchase money of the mortgaged premises, sold and conveyed by Crossett to Pinner.

There are two points made by way of defence. *First*, That the principal was not due when the bill was filed, and that tender had been made of the interest. *Second*. That when the mortgaged premises were conveyed, they were subject to certain tax liens still outstanding, and that, by virtue of the covenants against encumbrances contained in the deed of conveyance, the defendant is entitled to have the amount of such encumbrances deducted from the amount due on the mortgages, and a decree taken, if at all, only for the balance.

I think the second point is well taken, and that the first one is not. The rule of law is established in this state, by the case of *White v. Stretch*, 7 C. E. Green 76, and the previous decisions in chancery therein referred to, that in a suit to foreclose a purchase money mortgage, the mortgagor

Rogers v. Brokaw.

and grantee in the conveyance, can claim deductions for encumbrances covenanted against in the deed from the mortgagee. It is altogether an equitable and reasonable rule, and must be enforced in the present case. The assignees hold the mortgages subject to this equity; and the master, in ascertaining the amount due for principal and interest on the mortgages, must ascertain, also, the unpaid taxes against the premises at the giving of the deed, and deduct them, with lawful interest thereon, from the amount of the mortgages.

As to the first point, I am satisfied that the defendant neither paid or tendered the interest within the sixty days named in the bonds and mortgages. The only question as to this first point, is a question of fact. The special interest clause makes the whole principal due and payable immediately after default for sixty days in the payment of interest. The testimony in the case relates mainly to the question whether the interest for the first period of six months was in default within the meaning of this clause. My conclusion, from the evidence is entirely clear, that there was such default. The mortgages were not to be payable within five years, if the interest should be duly paid. The five years have nearly expired, and no interest, whatever, has been paid, nor, as before said, was it tendered, as it should have been, to prevent the principal from becoming due. It is unnecessary to discuss the evidence in regard to it.

I will advise a decree as above.

ROGERS and others vs. BROKAW and others.

1. The rule against the right to sever and remove fixtures, is stronger as between mortgagee and mortgagor than as between landlord and tenant.

2. Two machines, mainly of iron, one weighing thirty-six hundred pounds and the other two tons, placed directly on the floor of a factory, with no other support, and driven by connections with secondary shafting, which was connected by bands with the main shafting driven by a steam

Rogers v. Brokaw.

engine, changeable in their position as convenience might require, and that could be taken in and out of the factory without difficulty and in little time—*held*, between mortgagee and mortgagor, not to be fixtures, and that no title thereto passed by a sale under foreclosure of a mortgage on the land made prior to a chattel mortgage on the machines.

3. The intention to make a thing annexed to or placed upon the freehold, personal property, does not alter its legal character of fixture, if it be such. Whether fixture or not, depends on facts, and not on the opinion of the person making the annexation; and in this view, evidence is inadmissible to show his intention.

4. But the intention as to making a permanent or temporary annexation to the freehold, is a competent and material subject of proof.

5. Movable machines, whose number and permanency are contingent on the varying circumstances of business, subject to its fluctuating conditions and liable to be taken in or out, as exigencies may require, are different in nature and legal character from steam engines, boilers and other articles secured by masonry or other substantial annexation, designed to be permanent, and indispensable to the enjoyment of the freehold.

Mr. Keen, for complainants.

Mr. Alward, for defendants.

THE VICE-CHANCELLOR.

The question in this case is, whether two machines, one called a planer and matcher and the other a moulder, both being in a sash and blind factory in Elizabeth, are fixtures or not; in other words, whether they are or are not articles of a personal nature, which may be removed against the will of the owner of the land.

The machines were bought by the owner of the land, John T. Brokaw, in or about January, 1870, of the complainants, the makers of them, who took Brokaw's notes in the first instance for the price, and afterwards a chattel mortgage to secure three renewal notes amounting in all to about \$950, being the unpaid part of the original price. The complainant's suit is to foreclose this chattel mortgage. It is resisted not by Brokaw, but by the defendants, who hold title to the land through a sale by the sheriff, under foreclosure of a mortgage on the land, made prior to the chattel mortgage to the

Rogers v. Brokaw.

complainants. The chattel mortgage to the complainants was made May 10th, 1871, and describes the machines. The mortgage that was foreclosed, and under which the defendants have title, was made by Brokaw, May 19th, 1870. It describes, by metes and bounds, the lot of land, without referring to the machinery or to the kind of business carried on in the building on the lot. The sale under the foreclosure of this mortgage, was on April 4th, 1872. The defendants insist that by this sale, the machines, as connected with and part of the realty, now belong to them, free and clear of the chattel mortgage.

The question of fixtures is, in this case, between mortgagee and mortgagor, and in such cases, the rule against the right to sever and remove, is stronger than in some cases where a different relation exists, as for example, between landlord and tenant. But while this is so, my opinion is, and I shall advise, that the complainants here are entitled to hold their mortgage lien. Questions of fixtures have been subjects of numerous decisions in English and American courts, and from the nature of them, are often nice and difficult questions to decide. The rules governing their solution are sufficiently expressed, for present purposes, in the decisions of the courts of this state.

As between mortgagor and mortgagee, if the thing appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, it is a fixture resulting to the benefit of the mortgagee. As to the permanency, that does not depend so much upon the degree of physical force with which the thing is attached, as it does upon the motive of the party attaching it. If the article is attached for temporary use, with an intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold, he may. *Crane v. Bingham*, 3 Stockt. 29.

The true criterion of a fixture is the united application of the following requisites: 1. Actual annexation to the realty, or something appurtenant thereto. 2. Application to the

Rogers v. Brokaw.

use or purpose to which that part of the realty with which it is connected is appropriated. 3. The *intention* of the party making the annexation to make a permanent accession to the freehold. *Brearley v. Cor*, 4 Zab. 289 ; *Quinby v. Manhattan Cloth and Paper Co.*, 9 C. E. Green 261.

The machines, in the present case, were mainly of iron, one weighing about thirty-six hundred pounds, and the other, about two tons. They were put directly on the floor of the factory, with no other support, and driven by connections with the secondary shafting, which was connected by bands with the main shafting, driven by a steam engine. Their position on the floor was changeable, as convenience might require. They had holes through the soles or feet of their frames, by which they could be screwed to the floor. One of them, at least, was so screwed, but they could be easily unscrewed and moved. They could be taken in and out of the factory without difficulty, and in little time. The defendant, Brokaw, testifies as to his intention in putting in the machines, and it appears not to have been to make them part of the freehold. He had been several years in the business, and had other machines in his factory of a similar kind. From the facts testified to by him, and which are not contradicted, I think he would have been at liberty, notwithstanding the mortgage on the lot, to take the machines out at his pleasure. The question, how many machines of this description were needed, whether few or many, or, indeed, any at all, was one of convenience and business requirements, which he had the option to determine. His intention to make them personal property, would not alter their legal character. This would depend on facts, and not on his opinion ; and, in this view, evidence would be inadmissible to show his intention. But his intention, as to making them permanent or temporary annexations to the factory, is a competent and material subject of proof. Movable machines, like these, whose number and permanency are contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require, are different

Rogers v. Brokaw.

in nature and legal character from the steam engine, boilers, shafting, and other articles secured by masonry or other substantial annexation, designed to be permanent, and indispensable to the enjoyment of the freehold. The ruling in *Crane v. Bingham* embraces the things above mentioned, and not the ones now in dispute.

My conclusion on the whole is, that legal rules will be best observed, as well as the justice of the case best promoted, by a decree as above advised.



PREROGATIVE COURT.

MAY TERM, 1874.

In the matter of the probate of the will of ENGELINA S. WHITE, deceased.

1. The tearing out of the seal affixed to a will, and of part of the testator's signature, and the obliteration of the rest of his name and of the names of the witnesses, are a cancellation of the will.

2. From the finding of a will in testator's box thus cancelled, the presumption arises that the cancellation was his act, done *animo cancellandi* and that by that act, he intended to render the will null and void.

3. A general allusion in a letter found in the same box, to testator's will, and a conversation with the executor therein named, shortly before testator's death, in reference to a request made by the will and which was then known by the executor, are too loose and uncertain to establish a will contrary to the cancellation by the testator himself.

Mr. I. W. Lanning, for proponent.

THE ORDINARY.

On the 28th of January, 1874, Engelina S. White, widow, died in the city of Trenton. At the time of her death, she was the owner of real and personal property. Immediately after her decease, there was found in a repository, (a tin box,) which she had kept in her room for many years and which she called her "bank," among her deeds and other writings, a paper which she had executed on the 30th of December, 1867, as her last will and testament. With it was found a letter written by her to her cousin, on the 4th of July, 1871, endorsed with a direction "to be opened one hour after my death," by which she requested the lady to whom it was addressed, to take exclusive possession, on the day or night of the writer's death, of all her personal property, her wardrobe household furniture, papers, silver and jewels, and all belong-

In the matter of the will of Engelina S. White.

ing to her in the house, until her will should be read, adding "then the rightful (owner) may come forward with a just claim upon the property, but not until then," and ended the letter with an expression of her continued confidence in her cousin. By that will she gave all her property, real and personal, to her uncle, Edmund Bartlett and his wife, and requested that her remains be buried in the same lot or burial plot with her deceased children, in St. Louis, Missouri. She appointed Mr. Bartlett her executor. He now offers that paper for probate as her last will and testament. The execution of it is fully proved. It purports to have been, and actually was executed under her hand and seal, and the certificate of attestation declares it to have been signed, sealed, published and declared by her, as her last will and testament. When found, after her death, it was not enclosed in an envelope, but was lying folded up in a pocket-book in the box. The seal had been carefully torn off; the paper where the seal had been affixed, being torn entirely out with that on which the greater part of her surname as signed to the will was written, and the rest of her signature was obliterated with very heavy pencil marks. The signatures of the three witnesses were obliterated in like manner. The will is written on the two sides of a half sheet of paper, and was signed but once. The testatrix died about six years after the execution of that instrument, and about three years and a half after the date of the letter above mentioned. It does not appear that she made any reference to her will after writing the letter, except in a conversation with Mr. Bartlett shortly before her death, in which, referring to the fact, that, as he knew, she had in her will requested that she might be buried at St. Louis, she said she had changed her mind on the subject, and wished to be buried where her husband was buried, in Burlington county, in this state.

The will bears clear evidence of the intention to revoke it. The tearing out of the seal and of part of the signature of the testatrix, and the obliteration of the names signed to the will, are a cancellation of the will. *Avery v. Pixley*, 4 *Mass.* 460;

Swackhamer v. Kline's Administrator.

Hobbs v. Knight, 1 *Curteis* 768 ; *Goods of James*, 7 *Jur.*, N. S., 52 ; *Price v. Powell*, 3 *H. & N.* 341 ; *Smock v. Smock*, 3 *Stockt.* 156. And from the fact that the will was found in the possession of the testatrix, in her repository, thus cancelled, the presumption arises that the cancellation was her act, done *animo cancellandi*, and that by that act, she intended to render the will null and void. *Smock v. Smock*, *supra* ; 4 *Kent's Comm.* 532 ; *Davies v. Davies*, 1 *Lee* 444 ; *Lambell v. Lambell*, 3 *Hagg.* 568 ; *Baptist Church v. Robbarts*, 2 *Barr* 110.

Nor can the will be established by the evidence of the letter and conversation above stated. There is no proof as to when the cancellation took place. It may have been after the letter was written ; and besides, the reference to a will in that letter does not necessarily point to this instrument. The allusion to the request contained in the will as to the place of her burial, is not sufficient to revive the will. "It would be very dangerous," said Sir George Lee, in *Davies v. Davies*, "to establish wills on loose general declarations, contrary to apparent acts done by testators themselves."

Probate of this will must be denied.

SWACKHAMER, appellant, and KLINE'S ADMINISTRATOR,
respondent.

1. A party having no interest or claim under the intestate, in lands ordered to be sold for the payment of his debts, but setting up a claim thereto by title paramount, is not entitled to appeal from the order of sale.

2. He only, who is aggrieved by such order, has the right to appeal and a party aggrieved is one whose pecuniary interest is directly affected by the decree, or whose right of property may be established or divested thereby.

3. The Orphans Court cannot try title to lands, under proceedings for sale thereof for payment of debts.

Swackhamer v. Kline's Administrator.

On appeal from an order of the Orphans Court of Hunterdon county.

Mr. G. A. Allen, for appellant.

Mr. J. N. Voorhees, for respondent.

THE ORDINARY.

This is an appeal from an order of the Orphans Court of the county of Hunterdon, directing that certain land of Peter P. Kline, deceased, an intestate, be sold to pay his debts. The application for the order was made by the administrator, on representation of the insufficiency of the personal estate. The appellant appeared before the Orphans Court at the time fixed in the order to show cause, and opposed the making of the order to sell, on the ground that he, at the time of Kline's death, was the lawful owner of the land mentioned in the petition filed by the administrator; and that Kline not only did not die seized of it, but never was seized of it. In proof of this claim, he laid before the court his deeds of conveyance for the property. The court, however, notwithstanding this action on the part of the appellant and his claim of ownership, ordered that the land be sold. From this order, Swackhamer appealed. Motion is now made to dismiss the appeal, on the ground that he has no right of appeal in the premises.

The act "making lands liable to be sold for the payment of debts," (*Nix. Dig.* 855,) provides that, on such applications to the Orphans Court as that above referred to, notice shall be given to all persons interested in the lands, tenements, hereditaments, and real estate of the testator or intestate; that the court shall, if they find that the personal estate is insufficient to pay the debts, direct the executor or administrator to sell the whole, if necessary, of the lands, tenements, hereditaments, and real estate of the testator or intestate, or so much thereof as will be sufficient for the purpose. It also provides that the conveyance of the executor or administrator shall vest in the purchaser all the estate that the testator or inter-

Swackhamer v. Kline's Administrator.

was seized of at the time of his death, if the order be obtained within one year thereafter ; but, if not, then all the estate that the heirs or devisees of the testator or intestate had when the order for sale was made.

The appellant is not a person "interested in the lands, tenements, hereditaments, and real estate of which the intestate died seized." He has no interest in the sale of any of the lands of the intestate. He is neither a creditor nor an heir ; and, indeed, he claims to be interested in the proceedings only in consequence of his title to the land ordered to be sold. The Orphans Court cannot try the title to land in such proceedings. *Hewitt v. Hewitt*, 3 *Brad. Sur. R.* 265. The conveyance which the administrator may make, in pursuance of the order authorized by the order in question, will pass only the estate, if any, which the intestate had in the property at the time of his death, if the order was made within a year thereafter ; or, if it was not obtained within that time, that, if any, which his heirs had in it when the order was made. No interest or title of the appellant can be affected, in any degree, by the sale. As to him, the proceedings are *res inter alios acta*. The constitution of this state, indeed, provides that "all persons aggrieved by any order, sentence, or decree of the Orphans Court, may appeal therefrom, or from any part thereof, to the Prerogative Court ;" but the appellant is not, in the meaning of the constitution, a person aggrieved by the order in question. A party aggrieved is one whose proprietary interest is directly affected by the decree ; one whose right of property may be established or divested by the decree. *Wiggin v. Swett*, 6 *Metc.* 194 ; *Bryant v. Allen*, 7 *H.* 117 ; *Shields v. Ashley's Adm'r*, 16 *Mo.* 471 ; *Richardson v. Richardson*, 2 *Root* 219 ; *Lewis v. Bolitho*, 6 *Gray* 34 ; *Deering v. Adams*, 34 *Maine* 41 ; *Swan v. Picquet*, 3 *Me.* 443. In *Richardson v. Richardson*, an appeal was taken from a decree of the Probate Court, under circumstances similar to those of the present case. The statute under which the appeal was taken, gave an appeal to any person aggrieved. The court, in dismissing the appeal, said, that

Raleigh v. Rogers.

if the appellants had shown themselves to have been heirs-at-law of the intestate, or that the deed under which they claimed was voluntary, and would be affected by the allowance of the debts or the sale by the administrator, they would have entitled themselves to the appeal; but, as their father, under whom they claimed, was a purchaser from the intestate for valuable consideration, it did not appear how they were interested, or could be affected by the doings of the Court of Probate, or of the administrator.

The appeal will be dismissed, with costs.

RALEIGH, appellant, and ROGERS and wife, respondents.

A stranger to partition proceedings before the Orphans Court, having no right that will be affected by a partition, and claiming the land by title paramount to that of the parties to such proceedings, has no right of appeal from an order appointing commissioners to make partition. He is not a person aggrieved by such order, within the meaning of the constitutional provision for appeal.

On appeal from the decree of the Orphans Court of Burlington county.

Mr. Ewan Merritt, for appellant.

Mr. C. E. Hendrickson, for respondents.

THE ORDINARY.

This is an appeal from a decree of the Orphans Court of the county of Burlington, appointing commissioners to make partition of certain land in that county, of which, it is alleged, David Cavileer died seized. He devised the land to Samuel Leeds for life, with remainder in fee to the children of Leeds. Leeds is dead. Mrs. Rogers is one of his children. At the time appointed for the appointment of commissioners,

Raleigh v. Rogers.

the appellant appeared before the court and filed his protest against the appointment. The protest sets up a paramount title in the appellant to the land. The only evidence he laid before the court however, was an ancient unrecorded deed, dated April 10th, 1795, from Restore Shinn to Richard Stockton and Clayton Earl, for certain premises in which, as the appellant claims, the land of which partition was sought, was included. It is true, his protest is under oath, and alleges that he is now the true owner of the property, and denies the title of Cavileer. But that, of course, is no evidence of the appellant's title. Though the record is silent on the subject, the court is presumed to have been satisfied of the *prima facie* title of the parties between whom partition was prayed. There was nothing laid before them by the appellant, to lead them to conclude that the title was not in the parties in whose interest the application was made. I see no reason to doubt the propriety of their action in appointing the commissioners. The appeal could not be sustained on its merits. But it must be dismissed, on the ground that the appellant has no right of appeal in the case. He is a stranger to the proceedings. No right of his will be directly affected by the partition. He claims by title paramount to that of the devisees under Cavileer's will. The act expressly provides (*Nix. Dig.* 671, § 27,) that nothing contained in it shall be so construed as to injure, prejudice, defeat or destroy the estate, right or title of any person or persons claiming the land which may be divided by title paramount or superior to the title of the coparceners, joint tenants or tenants in common, among whom the partition is made. The appellant is not a person aggrieved by the action of the Orphans Court, within the meaning of the constitutional provision for appeal. *Swackhamer v. Kline's Adm'r*, decided at this term of this court, and cases there cited.

The appeal is dismissed, with costs.

In the matter of Clement's Appeal.

OCTOBER TERM, 1874.

In the matter of CLEMENT'S Appeal.

The Orphans Court has power to revoke letters of guardianship obtained through false representations.

Mr. A. S. Boyd, for appellant.

THE ORDINARY.

This is an appeal from a decree of the Orphans Court of the county of Bergen, made on the 28th of June, 1873, revoking letters of guardianship of the persons and estate of the children of John P. Costello, deceased, issued to the appellant by the surrogate of that county, on the 6th of December, 1872. These letters were issued on a written request, signed by the mother of the children, dated July 23d, 1872, and addressed to the court. She thereby renounced her right to the guardianship of her minor children, David, Christopher, Mary, Elizabeth, John, and Thomas Patrick, and requested that the appellant be appointed guardian. The application for the letters was made on the day on which they were issued. The children were aged respectively, fifteen, thirteen, eleven, nine, seven, and about two years. On the 25th of January, 1873, Mrs. Costello filed her petition in the Orphans Court, alleging that on the 4th of December, 1872, certain persons conspired against her to obtain possession of her children, and to that end, caused her arrest and imprisonment in the county jail of Bergen county, and that on her release and return home, (she resided at Englewood, in that county,) she found that her children were scattered, and as she alleged, she was unable to ascertain the whereabouts of the three youngest, although she had made diligent search and inquiry for them;

In the matter of Clement's Appeal.

that she had been informed and believed that the children had been taken from their home on the day after her arrest and imprisonment; that she was informed that on the 6th of December, and while she was confined in jail, letters of guardianship of the children had been issued to the appellant; that she was entirely ignorant of the making of the appointment or of the proceeding in which it was made; that she did not knowingly sign any such paper as that above mentioned; that if her signature had been obtained to it, it was by misrepresentation of its contents; that she never heard the name of the appellant mentioned or proposed as the guardian of her children by any one; and that she would never knowingly have given her consent to the appointment of the appellant or any one else, to the guardianship. The petition prayed that the letters granted to the appellant might be revoked. The court, on the filing of the petition, made an order that the appellant show cause, on the 17th of February, 1872, why the letters should not be revoked. The order was served on him on the day on which it was made. Under this order, testimony was taken by the parties, and on the 28th of June, 1873, by the decree above mentioned, the court revoked the letters. From this decree the appeal under consideration was taken.

The appellant insists that the Orphans Court had no power to make the decree appealed from; that that court has no power to revoke letters of guardianship for any cause not specified by statute, and that it has no inherent power to right a wrong done in the appointment of a guardian, even though the appointment was procured by fraud. So broad a proposition cannot be maintained. The act "respecting the Orphans Court and the power and authority of surrogates," (*Nix. Dig.* 640,) gives to the court full power and authority, among other things, to hear and determine all disputes and controversies whatever respecting the right of guardianship. It empowers the court to appoint guardians, and to revoke their letters for causes specified in the act. Fraud in the appointment is not one of those causes. But the court is not

In the matter of Clement's Appeal.

entirely confined to the powers specially granted by the legislature; and to a limited extent, such tribunals are in the habit of exercising incidental powers, which it is obviously necessary they should possess in order to prevent a failure of justice in consequence of mistakes and accidents, against which human foresight is not able to guard, and the more especially to guard against the consequences of frauds perpetrated on the court itself. Such power the ecclesiastical courts in England have constantly exercised. In *Carolus v. Lynch*, 1 *Lee's Ecc. Rep.* 13, administration which had been granted to one who falsely pretended to be a creditor of the intestate, was revoked. In *Cornish v. Cornish*, *Id.* 14, administration which had been granted to an illegitimate son on a false affidavit, was revoked. In *Burgis v. Burgis*, *Id.* 121, an administration granted to a brother of an intestate was, on the interest of a minor son being established, revoked, and decreed to the guardian for the use of the minor. In *Ogilvie v. Hamilton*, *Id.* 357, a fraudulent administration was revoked, and in *Smith v. Corry*, *Id.* 418, administration granted on false suggestion, was revoked. See also *Harrison v. Weldon*, 2 *Str.* 911. Such power has been held to exist in the surrogates in the state of New York, on the ground that it is absolutely essential to the administration of justice. *Pew v. Hastings*, 1 *Barb. Ch. R.* 452; *Vredenburg v. Calf*, 9 *Paige* 128; *Proctor v. Wanmaker*, 1 *Barb. Ch. R.* 302; *Skidmore v. Davies*, 10 *Paige* 316; *Campbell v. Thatcher*, 54 *Barb.* 382. In *Carow v. Mowatt*, 2 *Edw. Ch.* 57, it was held that if, through mistake or inadvertence, administration was committed to an infant, the surrogate should revoke the appointment. In this court, in the matter of the will of Isaac Lawrence, 3 *Halst. Ch. R.* 215, the Ordinary vacated the probate of a foreign will as having been improvidently granted. In the present case, the court having afforded the appellant an opportunity to be heard, of which he availed himself, and having found that the letters were issued upon a false representation, revoked them. I think they had a right to do so under the circumstances.

In the matter of Clement's Appeal.

It remains to consider whether their action was justifiable. From a perusal of the testimony in this case, it is impossible to resist the conclusion that the document on which the appointment was made, was signed by Mrs. Costello, without a knowledge of its full import. She evidently supposed that it was merely intended to give to the person to be appointed, the charge of the pecuniary interests of her children, and not to deprive her of the custody of their persons. And there is abundant evidence that it was well understood by those who procured her signature to the paper, that such was her understanding of it. One of them, who appears to have been the principal actor in the business, says, that after she had been arrested, he spoke to the appellant of the necessity of getting out the letters, in order to place the children in the institution in which they proposed to put them ; that no opportunity had occurred between the date of the instrument, July 23d, and the 6th of December, to take away the children, as they feared the results on account of the scandal which might arise from it to the mother ; that they wished to do it as peaceably as possible ; and he adds, that he does not believe that they could, at any time during that interval, have obtained possession of the children without a breach of the peace ; that they would have had to take them away against her will, and certainly could not have done it without a breach of the peace ; and that they thought it an excellent opportunity while she was in jail, to get them. The institutions above alluded to, were two orphan asylums, one in Newark and another in Paterson, and a foundling hospital in the city of New York. Two of the youngest of the children were placed in the orphan asylums, and the youngest, a nursing child, in the foundling hospital. The charge on which Mrs. Costello was committed to jail, was disorderly conduct. She was committed by the person, a justice of the peace, who obtained her signature to the request on which the appointment was made. He alleges that he read the paper to her when she signed it, and that he believes she understood it. He did not explain it to her, however.

In the matter of Clement's Appeal.

The value of his testimony on this score is diminished by the fact that he professes ignorance as to the origin of the paper ; says he does not know from whom he received it, with instructions to get it signed, nor who got it from him afterwards ; nor can he say in whose handwriting it is. In short, he professes an ignorance in regard to the instrument, which is all the more incredible from the circumstance that the person by whom it was written, testifies that he wrote it at the request of the justice himself, and Mrs. Costello swears, that when he came to get her signature, he told her that that person had requested him to get it. It is not necessary to impugn the motives of the actors in this matter. Their method, however, is open to reprehension. However disinterested their motives, and however benevolent their intentions, the representation made to the court by means of the instrument to which they had obtained Mrs. Costello's signature, was a fraud on the court in the premises. She had not knowingly requested the court to appoint the appellant guardian of the persons of her children, and it is impossible to doubt that the actors in this matter well knew it. That she would resist the appointment of a guardian, which could by any means result in depriving her of the custody of her children, especially of her nursing child, was not to be doubted. The use of this instrument, then, for the purpose of procuring the appointment of a stranger as the guardian of the persons of her children, as a means of depriving her of them, however benevolent the end designed to be accomplished, was a misrepresentation. Its effect would be to prevent the court from looking into the matter and exercising their discretion on the subject. They would naturally, at the request of the mother, readily appoint a guardian named by her, while under other circumstances, they would at least have listened to her remonstrance, and advisedly have taken such action in the premises as seemed most judicious. I see no reason for reversing the decree. It will be affirmed.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.
JUNE TERM, 1874.

CRONKRIGHT, appellant, and HAULENBECK and wife, respondents.

In ascertaining the proper sum to be paid in gross to a tenant in dower or by the curtesy, in commutation of such interest, the 130th and 131st rules of the Court of Chancery on the subject, should not be taken as an absolute guide ; but, irrespective of the result of the application of the rule to the case in hand, the court should determine what, in that case, under the circumstances thereof, is a reasonable sum to be paid in commutation.

On appeal from the decree of the Court of Chancery. The opinion is reported in 8 *C. E. Green* 409.

Mr. Gilchrist, for appellant.

Mr. Williamson, for respondents.

Cronkright v. Haulenbeck.

The opinion of the court was delivered by

THE CHANCELLOR.

This is an appeal from the decree of the late Chancellor, overruling exceptions to the report of the master fixing the gross amount to be paid to the widow of James Cronkright, deceased, in lieu of her dower in lands of which he died seized, which were sold by order of the Court of Chancery, in a suit for partition. The property consisted of what are known as the Cronkright homestead, the Cashman place, and the Durango place, all situate in English Neighborhood, in the county of Bergen. The master reported that the widow was entitled to receive the sum of \$9508.50, in compensation for her dower. The estimates made by the witnesses, of the value of the annual rental of these lands, is not, in any instance, based upon their productiveness or capabilities for agricultural or horticultural purposes, though they are all in a rural neighborhood, and each property is of sufficient size to give it value for those objects, but the estimates are founded on their value as country residences. The witnesses agree that the premises are all in need of repairs, but differ widely as to the cost. They differ, also, as to the rental value. The weight of the testimony is in favor of the conclusion at which the master arrived ; and, viewing the subject without reference to the application of the rule of the Court of Chancery, by which the amount was ascertained, it seems clear that the sum fixed by the master was quite equal to the commutation value of the dower. The act by which the Court of Chancery is authorized to sell in partition, the estate in dower, or by the curtesy, provides (*Nix. Dig.* 672) that, on sale being made of any such estate, the court shall direct the payment of such sum in gross, out of the proceeds of the sale of the premises, to the person entitled to such estate, as shall be deemed a just and reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof ; but, in case no such consent be given before the making of the order for distribution of

Cronkright v. Haulenbeck.

the proceeds of such sale, then the court shall ascertain and determine what proportion of such proceeds will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower, or by the curtesy, and shall order the same to be invested and disposed of in the manner directed by the twenty-third section of the act "for the more easy partition of lands held by coparceners, joint tenants, and tenants in common." To ascertain what, in such cases, is just and reasonable compensation, the rule above referred to was established. It is contained in the one hundred and thirtieth and one hundred and thirty-first rules of the Court of Chancery. That rule is called in question, in this cause, and is complained of as being unjust in its operation. That it is liable to objection, is undeniable. It is based on the tables by which life insurance companies are guided in taking their risks. And while those tables, which are the result of observation as to the average duration of human life, are sufficiently reliable for the purposes of insurers, the theory and necessity of whose business it is to deal, not with a few, but with numerous life risks simultaneously, they are obviously of but little value in estimating the probable duration of any one life. The average time of the happening of many uncertain events of the same character can, of course, be no sure criterion by which to determine when any one of them will occur. And yet it is not without reason that these tables have been adopted as a means of fixing the gross sum to be paid in commutation of dower and curtesy. The average duration of life which they establish, seems to be the very best guide attainable in laying down a rule; and, indeed, it would be very difficult to devise or discover a better one. The difficulty lies deeper. It is in the application of a rule to a subject which, in strictness, admits of none; and while, in very many cases, the rule in question will be found to work no injustice, there will be many in which it will operate hardly on the one party or the other. When applied to curtesy, its injustice is often intolerable, and its operation almost equivalent to a disinherison of the heir. What, then,

Rorback v. Dorsheimer.

is the remedy? It is to be found in individualizing each case as it comes before the court for consideration, in disposing of each case on its particular merits, using the rule merely as a means of approximation. Any commutation of dower or curtesy may prove, in the sequel, to have been an injudicious bargain on the one side or the other, and yet it may seem most advantageous to all parties that there should be a commutation. In my judgment, the rule in question, although it has the sanction of many years' use, ought to be so modified as to subject each case to the opinion of the master as to the amount which, notwithstanding the result of the application of the process, ought to be paid in commutation of the dower or curtesy, to the end that the Chancellor may fix such sum as he may deem just and reasonable under the circumstances.

I am of opinion that the decree of the Chancellor in this case, should be affirmed, with costs.

Decree unanimously affirmed.

RORBACK and others, appellants, and DORSHEIMER,
respondent.

1. The rule is not entirely inflexible, that the substance of the complainant's case must be contained in the stating part of the bill.

2. A charge of fraud should not be general, but if so charged, the defect must be taken advantage of by demurrer.

3. The sureties of administrators cannot be joined as substantial parties to a bill against the representatives of such administrators, which is grounded on an alleged devastavit committed by such original administrators.

4. The proper course of proceeding in such case, pointed out.

The opinion of the Chancellor is reported in 8 C. E. Green 47.

Mr. McCarter, for Rorback and others.

Mr. Coult and *Mr. Pitney*, for Mary Dorsheimer.

Rorback v. Dorsheimer.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The facts involved in this controversy will be found so fully stated in the opinion of the Chancellor, read in the court below, that I feel it is quite unnecessary here to reproduce them in detail. They will, consequently, be referred to in a general way, and only so far as may be requisite to present the questions considered and decided.

Mary Dorsheimer, alleging herself to be an idiot, by her guardian, exhibited this bill. The purpose was to recover her distributive share in the estate of her grandfather. This ancestor died intestate, and his administrators made a final settlement of their accounts in the Orphans Court. It is shown that they duly paid over the residue of the moneys thus appearing to be in their hands, to the various descendants of the intestate, with the exception of the share now in dispute in this action. This last share was paid over by the administrators to one John Rorback, by virtue of an assignment thereof, alleged to have been made by the complainant to him. The first branch of this controversy relates to the validity of this instrument. The complainant insists that it was obtained from her by fraud, and that the money was paid under it by the connivance of the administrators. These administrators thus inculpated being dead, the suit is against their representatives. John Rorback is also a defendant. The bill, in this aspect of it, seeks to charge this money on both Rorback and the administrators now before the court. The decree of the Chancellor in this respect, was to the effect that this defendant, Rorback, was primarily responsible, and that a secondary liability vested in these representatives.

The defence interposed to this part of the case, was two fold. First, that no fraud in obtaining the assignment in question and in paying the money upon it, was shown. But I think these facts are very clearly established. The Chancellor has briefly stated a portion of the circumstances, and has, in a measure, discussed the evidence. I do not feel it incumbent on me to do so. It seems to me that the testimony cannot

Rorback v. Dorsheimer.

leave any doubt on this subject in any unprejudiced mind. In this particular I fully assent to the views expressed by his Honor, the Chancellor.

But, in the second place, it was said that this charge of fraud in the procurement of this assignment, was not set out as a substantive part of the complainant's case, but was inserted merely in the charging part of the bill, in anticipation of the defence of payment.

It must be admitted that this pleading is dangerously meager in point of substance, and is defective, in many respects, in point of form. On account of these defects, it is somewhat difficult to say where the stating part of the bill ends. It is not certain, therefore, that the charge of fraud in question, is not a part of the statement of the complainant's case. And it is also to be remembered that the rule is not entirely inflexible, that all the grounds of suit must be embraced in the stating portion of the pleading. Indeed, so far is this from being the case, that in his discussion of this subject, Judge Story, in his treatise on Equity Pleading, (§ 32 *a*) says: "But if the material facts are specifically averred, there does not seem to be any positive rule of law which requires that those facts should be averred in the stating part of the bill, and precede what is technically called the charging part of the bill. Regularly, however, all the material parts of the plaintiff's case will certainly find their more appropriate place in the narrative or stating part of the bill."

It was also further urged, in reference to this same matter, that even if the charge of fraud was to be considered as a part of the narrative of the complainant's case, still it was not charged with sufficient particularity. Many cases were cited by counsel to establish the doctrine that an averment of fraud in general terms was inadmissible. There can be no doubt as to the rule. In equity, as at law, every material fact must be stated with reasonable fullness and particularity. But this imperfection, if it is to be the subject of exception, must, in the main, be brought to the notice of the court by a demurrer. It is but seldom, and only when the statement is

Rorback v. Dorsheimer.

so vague and loose as to be utterly inert and inefficient, that it can be objected to at the final hearing. The general rule is, that the court will not listen to such objections at the hearing of the case, if the matters stated are such that the court can properly proceed to a decree. In the present case, the charge of fraud in the bill, such as it is, has been put at issue by the answer, and has been amply elucidated by the evidence; obviously, therefore, both parties have understood the matter in dispute; for the court then, at the last stage of the cause, to annul the whole proceeding, on the ground that a formula of pleading has not been complied with, would be inequitable, and not, it is believed, in accordance with a single precedent. But in addition to this obvious answer to the position, it is further to be noticed that the bill, defective as it is in numerous particulars, is not open to this specific objection. The fraud is not charged in general terms. It does not say merely, that the assignment was obtained by fraud, but it avers that the complainant was an idiot, and that the defendant procured the execution of the instrument by taking advantage of her infirmity. Such transactions are seldom circumstantial; there is no necessity for the use of device or artifice; in such affairs the fraud generally consists in the simply asking the idiot to sign the instrument, and the facts of idiocy and of signing, are the only ingredients of it. It is therefore questionable with me whether, in this respect, this bill would have been assailable even by a demurrer; that it is so, on the final argument of the merits, I see no plausible reason to assert.

The foregoing are the grounds contained in the appeal of John Rorback, and for the reasons stated, I think the decree in these respects, should be in all things affirmed.

The other branch of the case arises on the cross-appeal of Mary Dorsheimer, the complainant in the court below. The part of the Chancellor's decree thus objected to, appertains to the following facts:

It has been already stated that the bill is filed against the administrators of the deceased administrators. But it also makes defendants the sureties on the bond of such deceased

Rorback v. Dorsheimer.

administrators, and it seeks a decree against them on account of the misappropriation of the moneys constituting the distributive share of the complainant. So far as the effort is to charge the representatives of the deceased administrators on account of such misapplication of the funds of the estate, it seems legitimate enough, as the statute makes the personal representatives of an administrator responsible for a devastavit committed by him. But the question now is, whether, in a bill in chancery against such representatives, grounded on such alleged devastavit, the sureties on the administrators' bond can be joined, and the bond declared to be forfeited. The Chancellor denied the right of the court to make such decree, and the complainant below, on that head, has brought this cross-appeal.

This joint proceeding against the administrators or their representatives, and the sureties on the bond, has in its favor no English precedent. But there are cases in this country which, where certain conditions exist, sanction the course. The leading case in this line, most pressed upon the argument, is that of *Carow v. Mowatt*, 2 *Edw. Ch. R.* 57. This decision sanctions the procedure in question, in all cases where the remedy at law on the bond is difficult and doubtful, and it appears, further, to hold that such emergency arises where the original administrators are dead. The adjudications of the courts of South Carolina and Virginia sustain the same doctrine. But I cannot assent to the reasoning on which these cases rest. Their principal grounds seem to be, that such course of practice is highly convenient, and that it is beneficial to the surety. But the argument derived from these considerations, proves by far too much, for it would clearly legalize a resort to equity in all cases of suretyship. It would always prevent a multiplicity of suits, and the presence in court of the surety would, in a measure, be advantageous to him, as he could watch the proceeding against his principal, and thus assure himself against an illegal or excessive recovery, for which an ultimate responsibility may rest upon himself. But if equitable interposition is to be thus justified, it seems

Rorback v. Dorsheimer.

clear that such jurisdiction must extend over the whole field of remedies afforded by law to obligees against principal and surety. To the extent specified, such jurisdiction would always be convenient, and always advantageous. And yet it is undeniable that this jurisdiction does not exist. As a general rule, it is undoubted that equity has no such cognizance. Nor am I willing to concede that, when the remedy on the bond becomes difficult or doubtful at law, a court of equity can lend its aid. Indeed, if the remedy were entirely lost at law, it would be difficult, as I think, to maintain the right so to intervene. When such power is claimed, the character of the obligation to be enforced, appears to be entirely overlooked. The obligation inherent in a bond is altogether of a legal nature. It is enforced against a surety on the ground of his legal contract. Neither in morals nor in law, is he to be held beyond the express terms of his covenant. Both parties to the agreement, by the very form in which they put it, subject it to the operation of legal remedies. As then, neither the nature of the contract nor its form, places it within the cognizance of equity, to bring about such a result some new element must supervene, and that new element must be a subject of equitable jurisdiction. If, for example, a discovery becomes necessary, or fraud attaches to the instrument, then obviously the equitable right to investigate and decide will arise. But I think no case can be found, except those just referred to, in which it has been held, that a court of equity, as against a surety, will take charge of the case on the sole ground that it has become difficult to enforce his bond against him at law.

Independently of these general objections to the jurisdiction in question, it seems to me there are others which specially apply in the present case, and to all similar cases, and which are not to be obviated.

This suit is brought by a single distributee of an estate. The other distributees are not parties. The moneys secured by the administration bond is a common fund, established by law for the equal benefit of all these distributees.

Rorback v. Dorsheimer.

It is alleged in this case, that the residue of this estate was divisible into five portions, and that four of these portions have been paid. As between this complainant and these administrators, who are defendants in this suit, it may be proper to consider these facts as established ; but no such conclusive inference can be drawn with respect to persons not joined in this proceeding. There has never been any decree for distribution in the Orphans Court, so that the number of distributees has not been definitely ascertained. With respect to those who are absent from this proceeding, the fact of the payment of their shares is mere allegation, and nothing more. It may be, in point of fact, that not one of them has received satisfaction for his dividend. It does not seem to me that under such circumstances it can be reasonably contended, that any part of the money, secured by this administration bond, can be legally taken and appropriated to a single distributee. Suppose such appropriation should exhaust all the money that can be raised on this bond, and it should afterwards be discovered that some of the absent distributees have not been paid, or that their number is greater than is supposed. It seems to me that it is clear that the Chancellor is here asked to do what no court should do—to distribute a fund, which is a common security for several parties, in the absence of some of those who are interested, and who are afforded no opportunity of being heard with respect to its dispensation. The laws of this state have appointed a mode for equally distributing the moneys recovered on administration bonds. The bond, when forfeited, is to be put in suit by the order of the Ordinary, and the sum realized is to be dispensed under the superintendence of the same officer. By the method thus prescribed the rights of all parties are guarded and ensured. This system has, by the usage for a long period of time, proved itself capable of completely and easily accomplishing the purpose for which it was designed, and I think that a new method of proceeding ought not to be grafted upon it, at all events

Voorhees' Executrix vs. Melick.

except under very peculiar circumstances and in cases of strict necessity.

But, even if the foregoing reasons were not controlling, and if I thought, under proper conditions, the proceeding by this joint remedy in chancery could sometimes be used, still, in my opinion, it could not be resorted to in the present case. My reason for this conclusion is, that the remedy at law is neither difficult nor uncertain. The plain course of action is this: to take out letters of administration *de bonis non* on the estate of the intestate; demand the moneys admitted to be in the hands of the original administrators at the time of their death; and if not paid, to treat such refusal as a breach of the bond, and thereupon apply to the Ordinary for an order to put it in suit. The administrator *de bonis non* can then proceed to obtain an order for distribution, and can thus, with technical regularity, pay the shares which are unsatisfied. I am unable to see any obstacle to this course.

In my judgment, the decree of the chancellor should be in all things affirmed, but without costs on either side.

Decree unanimously affirmed.

VOORHEES' EXECUTRIX, appellant, vs. MELICK, respondent.

1. Estimates as to the value of property must be demonstrably erroneous to induce the court to interfere with them on appeal.

2. When property is sold by a trustee in violation of the terms of the trust, equity will hold such trustee responsible for the highest value of such property.

3. The non-joinder of parties, whose absence simply renders the defendant liable to a revival of the litigation, cannot, as a general rule, be taken advantage of at the final hearing.

The opinion of the Vice-Chancellor is reported in 9 *C. E. Green* 306

Voorhees' Executrix v. Melick.

Mr. G. A. Allen, for appellant.

Mr. Linn, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This bill was filed by Peter Melick against Peter E. Voorhees. The controversy arose out of this state of facts. The complainant, being in debt, conveyed to the defendant his farm, to be sold "as soon as possible to the best advantage," the proceeds to be applied, in the first place, to the payment of three mortgages then upon the property, and the residue, if any, to the settlement, pro rata, of three specified debts; one to John Rinehart, a second to one John Lane and the defendant, and a third to said John Lane, individually: the remainder, if any, was to be paid over to the complainant. The bill alleges that, after considerable delay, the defendant sold the property, and the object of the suit was to call him to account with respect to the moneys realized as rents or on the sale, or which, with due diligence, should have been realized. During the pendency of the proceedings the defendant, Peter E. Voorhees, died, and his executrix was substituted in his stead. On the argument before this court, a very strained exception was taken to the regularity of this substitution; but, as the fact upon which it rests is contradicted by the record, the proceedings and by the decree itself, it is not necessary further to give it attention.

The case was argued before the Vice-Chancellor, and, as it clearly appeared that the trustee had disposed of the premises in direct violation of the conditions of the conveyance to him, the decree held him to a strict account, and charged him with the full value of the property. The propriety of this holding was but faintly questioned on the argument before this court, and in my judgment the principle adopted was entirely unexceptionable. Nor do I think there is any ground for the interference of this court to be found in the estimate made in the Court of Chancery with respect to the value of the lands, or the sum which, in the form of rents,

Voorhees' Executrix v. Melick.

should have been realized. When dealing with mere valuations, which are pure matters of judgment, and to which no certain tests of truth can be applied, a very clear demonstration of error should be required to induce a superior court to displace the judgment reviewed, in order to substitute its own conclusions.

The objection which was most pressed was the one relative to an alleged non-joinder of parties to the suit. It was insisted that Rinehart and Lane, the two creditors whose debts are secured by the conveyance in question, in the event of the avails of the property being sufficient for that purpose, are necessary parties. It is obvious that these persons are interested in this suit, but it is also obvious that their rights will not be either jeopardized or impaired by any decision which can be made in their absence. The complainant is in court seeking the residue of the funds after the payment of all the enumerated debts, the claims of these two creditors inclusive. If he prevails, the moneys coming to these two creditors will be left in the hands of the defendant for them. Such a decree cannot operate injuriously on their interests. Nor are they here complaining that they have not been joined in these proceedings, but it is the defendant who complains, and who has just ground to complain. It will certainly be a hardship upon the trustee to have a decree made in the absence of these parties, because it will leave him open to a second suit, involving the same substantial issues. Either of the creditors thus omitted can call for an account under this trust. If then the defendant had objected to this obvious defect in time, he must have prevailed. But this he did not do, and now, for the first time, raises his objection on this appeal. Even if a final decree had been rendered in the Court of Chancery, I do not think that the practice of the court would permit us to listen, at this stage of the proceedings, to this complaint. The well settled rule was recognized and enforced by this court, in the case of *Cutler v. Tuttle*, 4 C. E. Green 556, and was stated in the opinion there read, in these words, viz.: "Where the defendant neglects to make the

Close v. Close.

objection by plea, answer or demurrer, of the want of parties who are only necessary to protect him from further litigation, the court, in its discretion, may refuse to sustain the objection at the hearing, or to require the complainant to add new parties in that stage of the suit." I think it may be said that the non-joinder of parties, whose absence simply renders the defendant liable to a revival of the litigation, cannot, as a general rule, be taken advantage of at the final hearing. That rule is evidently applicable in the present instance. Even if a final decree should go against the defendant in the present form of the suit, such incomplete judgment would be the product of his own neglect. But the proceedings, as they now stand, do not necessitate such an unsatisfactory conclusion. The present decree is but interlocutory, so that, by the order of the Chancellor, these omitted parties can be joined. This can be done even before the order of reference is executed by the master.

I think the decree appealed from should be affirmed, with costs.

Decree unanimously affirmed.

CLOSE, appellant, and CLOSE, respondent.

1. Where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or health of the wife, or where he has inflicted upon her any physical injury accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced.

2. No rigid rule can be presented to define the extent of the injury, actual or apprehended, which will justify judicial interference.

3. *Quere*: Whether relief will be granted in a case of extreme hardship, in the absence of any actual or apprehended physical injury?

Close v. Close.

The opinion of the Chancellor is reported in 9 *C. E. Green* 338.

Mr. C. Parker, for appellant.

Mr. Winfield and *Mr. Williamson*, for respondent.

The opinion of the court was delivered by
VAN SYCKEL, J.

This is an appeal from the decree of the Chancellor refusing to grant Ellen M. Close, the complainant, a divorce from bed and board for alleged cruelty on the part of her husband.

It is very difficult to give any affirmative definition which will express, with entire accuracy, the meaning of extreme cruelty in our statute concerning divorce. The courts, both in England and in this country, have refrained from laying down any inflexible rule which should serve as a standard by which to adjudge all cases.

The weight of authority is, that the injury actually inflicted or reasonably apprehended, must be bodily harm in distinction from mere mental suffering. 1 *Hagg. C. R.* 35; 2 *Phill.* 111; 28 *Eng. L. & Eq.* 603; *Law Rep.* 1 *Prob. & Div.* 295; *Saxt. Ch.* 474; 1 *Gr. Ch.* 459; 3 *Stockt.* 195; 5 *C. E. Green* 97.

The injury may be either to the safety of the person, or to the health of the aggrieved party, and it is not necessary that it be actually inflicted; it is sufficient if it be reasonably apprehended. Nor can any rigid rule be prescribed to define the extent of the violence, actual or apprehended, which will justify judicial interference.

Each case as it arises must be determined by the sound discretion of the court, according to the circumstances which attend it. Slight abuse of the person, accompanied by opprobrious language, which would imperil the health of a refined and delicate wife, might be endured with comparative unconcern by one of a less sensitive nature.

In *Cook v. Cook*, 3 *Stockt.* 195, there was a single act of per-

Close v. Close.

sonal violence, not of an aggravated character, but the wife was in feeble health, and the husband called her a dirty whore, and told her she ought to have her head broken, and she would get it unless she cleared out. The Chancellor held that he would not be governed by the degree of personal violence actually used, and that this evidence showed such a reasonable apprehension of bodily hurt as would entitle the complainant to relief.

In *Graecen v. Graecen*, 1 *Green's Ch.* 459, the divorce was granted without any proof of actual violence ; and in the later case of *Thomas v. Thomas*, 5 *C. E. Green* 97, the actual violence was such as, if repeated, would not have endangered life or limb, but the separation was decreed because the conduct of the husband was aggravated by the application of vile epithets to the wife.

In *Kelly v. Kelly*, *Law Rep. 2 Probate and Divorce Causes* 31, the Judge Ordinary declared that, "if force, whether physical or moral, is systematically exerted by the husband, with the view of bending the wife to his authority, in such a manner, to such a degree, and during such a length of time, as to break down her health, and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety." On appeal to the full court, (*Id.* 59,) this declaration was approved, the court saying that the evidence of actual injury was so slight, that they treated the case as one in which there was an absence of any proof of such physical violence as would justify a decree.

Without intending to adopt the view taken in the case last cited as the law of this court, it may be remarked that, if it is examined in the light of principle, it would be difficult to show its unsoundness. If the body is the only thing to be regarded in these cases, and the purpose and object of the court is to avert from the wife injury to her life, members, or health, there is no reason why the husband should be permitted to inflict an injury in one way which he would be restrained from doing in another.

Close v. Close.

Without attempting to give a definition of legal cruelty applicable to all cases, I think it may be safely said that, where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty of any actual violence which will endanger the safety or health of the wife, or where he has inflicted upon her any physical injury accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced. Whether, in a case of extreme hardship, in the absence of any actual or apprehended physical injury, she will be remitted for the redress of her grievances to the domestic forum, must be left for adjudication when the case presents itself.

The case made in the complainant's bill, if supported by the proofs, will entitle her to a divorce under the most rigid rule laid down in any of the cases above referred to.

The complainant testifies that, on the 6th of June, 1870, two days before the birth of her youngest child, a time when she most needed the sympathy and support of her husband, the defendant came into her room and applied the most revolting epithets to her; that the first time she came down stairs after her confinement, he called her a liar, raised his cane, and threatened to smash her, and then seized her by the arm and swung her across the room; that, on the 10th of the following August, he grabbed her in his arms and endeavored to force her up stairs, at the same time using the most violent language to her.

That, on the 3d of September, with threats and curses, he ordered her to leave his house, saying he would kick her out, if she did not go; that, on the 25th of September, he followed her up stairs, and there struck her a number of violent blows, and then followed her down stairs, opened the door, and kicked her off the stoop. She mentions other occasions on which he used like personal violence towards her, and says that repeatedly, during all this period, and frequently in the

Close v. Close.

presence of her children, he called her a whore, a sow, and a bitch, accompanying these vile epithets with an oath, and with threats of personal injury.

While it may be true that, smarting under the injury she has suffered, she has exaggerated the story of her wrongs, the other testimony in the cause shows that her statement is, by no means, wholly fabricated.

The defendant, himself, admits that he applied to her the vile terms she charges him with using, and he says that he used them whenever he thought they applied to her case.

Ella Close, one of the daughters of the defendant, testifies that, on one occasion, she had seen the defendant strike her mother with a cane; at another time, she saw him throw dishes at her, and on other occasions he had kicked her, using, at all these times, the most violent and abusive language to her.

Gertrude Close, another daughter, substantially corroborates her mother's account of the defendant's conduct on the 25th of September, and says that, before that, she had known her father to use violence to her mother; that she had seen him throw dishes at her across the table, and that she had very often heard him use abusive and profane language to her, almost every time he spoke to her, and often at the table, in presence of the younger children. The wife is likewise supported in her account of the occurrence of September 25th, by Mr. and Mrs. Maxwell.

Frederick N. Close, the son, who was called by the defendant as a witness, testifies that, on the occasion last mentioned, he saw the defendant push the complainant down off the step, and, as she attempted to come on again, he pushed her off a second time, when she fell on the swing.

James Close, who was present at this transaction, is the only witness who says that the defendant did not push complainant down on that occasion; and he is certainly mistaken, if not willfully false, for the defendant himself admits that he did take hold of complainant, and push her out of the house. The defendant further admits that, on the occasion alluded

Close v. Close.

to by his wife, he seized hold of her, and while attempting to force her up stairs, against her will, she fell from his arms on the stairs. In his testimony, he denies that he used abusive language to his wife on the 6th of June, but he is entirely silent as to the personal violence which she alleges he used the first time she came down stairs after her confinement. The statements of the wife with regard to the husband's violence on a number of occasions, are so fully corroborated by other testimony in the cause, that I am persuaded that her evidence is substantially true; and, if true, there can be no question that the defendant is guilty of extreme cruelty to her. The defendant's conduct, by his own admissions, has been of such a violent, if not brutal character, that a court to which the wife may appeal for protection, should, if there was no other evidence in the case, hesitate long before returning her to his control and authority as a husband.

I have not alluded to the violence of the defendant on the 11th of October, because he had reason to feel provoked by the very heavy purchases made by his wife on his account, by the advice of injudicious friends.

It was insisted with much earnestness on the argument of this cause, that the misconduct of the husband had been provoked by the wife; that she could insure her own safety by lawful obedience, and that if she would reform and return to her husband, the way of reconciliation was open to her.

A careful consideration of the testimony will furnish nothing to justify this assurance. These parties were married in January, 1846, and lived together without any serious discord for nearly twenty years, during which period, the complainant became the mother of nine children.

In 1865, without the slightest justification, the defendant became jealous of one Lehr, who had been a music teacher in the family for several years, and charged her with impropriety for the trifling circumstance that she helped Lehr at dinner to the tender loin of a beefsteak. The complainant herself, dismissed Lehr at once, evidently to prevent the recurrence of such a scene and to remove all cause of offence.

Close v. Close.

The defendant, in his answer, has charged his wife with infidelity to him, although he has been unable to state a single circumstance upon which even a suspicion against her purity can be founded. After 1865, the complainant's outbursts of ill-temper and violence gradually became more frequent, which can be accounted for only on the belief that he had become too freely addicted to the use of intoxicating drinks. The conduct of the wife, as detailed by the husband himself, furnished no adequate provocation for the cruelty with which he so persistently treated her; and if we believe the wife, supported as she is in a number of instances by the two daughters, she behaved with great forbearance and moderation.

The defendant has inflicted upon the complainant such repeated injury, and shown toward her such an abiding rancor and hatred, without, up to this time, giving any assurance that his conduct will be reformed, that I am satisfied the cohabitation cannot be resumed without peril to the safety of Mrs. Close, and think that the interposition of this court is justified and necessary, and that a divorce from bed and board for life, should be decreed. Under the circumstances of the case, the complainant will be entitled to a proper allowance out of the husband's estate for her maintenance and support.

In my opinion, the decree of the Chancellor should be reversed, with costs, in this court and the court below, and a reasonable counsel fee to counsel of complainant, to be settled by the Chancellor, and the case remitted to the court below, that it may be proceeded in according to the views herein expressed.

Decree unanimously reversed.

Butterfield v. Third Avenue Savings Bank.

BUTTERFIELD, appellant, and THE THIRD AVENUE SAVINGS BANK, respondent.

1. An order refusing to allow an answer to be amended does not so enter into a subsequent interlocutory decree deciding the merits, that it can be reviewed on an appeal from such interlocutory decree.

2. It is a matter for consideration, how far exceptions, taken on a *viva voce* hearing before the Vice-Chancellor, should be specified in the petition of appeal.

3. An answer which admits that a mortgage was executed to the complainant, a corporation, of "the purport and effect set forth in the bill," does not raise any issue as to the corporate existence of such complainant, or its capacity to take such mortgage.

Mr. J. B. Vredenburg and *Mr. I. W. Scudder*, for appellant.

Mr. McCarter, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The Third Avenue Savings Bank, a corporation created by the laws of New York, exhibited the bill in this case to foreclose a mortgage, given to it by one Anthony W. Dimock upon lands in this state. The appellant, Butterfield, who was a defendant in chancery, is the holder of a second mortgage on the same premises, given by the same person. In his answer, referring to the mortgage of the complainant, the defendant says, "that he admits that the said Dimock, etc., did make and execute an indenture of mortgage, of such date, and of such purport and effect, as in the complainant's said bill mentioned and set forth." This answer then denies that there is due to the complainant the principal sum mentioned in the said bond and mortgage, and alleges that a part

Butterfield v. Third Avenue Savings Bank.

has been paid, and asks that a reference may be made so as to ascertain how much continues to be due.

Some time after the filing of this answer the defendant, Butterfield, applied to the Chancellor for leave to file a supplemental answer, on the ground that he had discovered, since putting in his defence, that, by reason of certain statutes of New York, the complainant, in making the loan to secure which the mortgage in suit was given, was acting *ultra vires*. The Chancellor refused to permit this defence to be put in by way of amendment, and there was no appeal directly from this determination. The case went then to hearing, the proofs being taken *viva voce*, before the Vice-Chancellor.

When the complainant offered his mortgage in evidence it was objected to on two grounds: first, that the corporate capacity of the complainant must be shown; and second, that its right to take a conveyance of real estate in New Jersey must also be made to appear. This exception being overruled, the defendant then offered to show, affirmatively, that the complainant was a corporation under the laws of New York, and by such laws was forbidden to loan money on the security of real estate in New Jersey. This offer was rejected, and the Vice-Chancellor proceeded to render a decree in favor of the validity of the mortgage of the complainant, and directed the usual reference to a master to ascertain the amount due, etc. From the interlocutory decree the defendant, Butterfield, took this appeal, and assigned in his petition the following ground, viz.: "That the said decree adjudges that the mortgage of the said complainant was and is an existing encumbrance on the mortgaged premises in the pleadings in the cause mentioned, prior to the defendant's mortgage, and that the defence of Frederick Butterfield is not a bar to the foreclosure, etc."

From this statement of the course of the proceedings in this case, I think it is clear, that the present appeal does not bring before this court the order of the Chancellor refusing permission to the defendant to put in a new or supplemental answer. That order, of course, had its effect upon the cause, and was

Butterfield v. Third Avenue Savings Bank.

appealable in its nature ; but as no appeal has been taken to it, and as it has not entered, in any wise, into the interlocutory decree which is here before this court, its propriety cannot now be reviewed. It is not always easy to decide whether an order or decree made in the progress of a cause has such an operation that it so affects and incorporates itself into a later decree as to become cognizable by this court when the latter has been placed before us by an appellate proceeding. But an order which simply regulates the proceedings, no matter how much such order may affect the conduct of the cause or the rights of the parties, does not seem to be embraced within this field of uncertainty. Such orders would manifestly seem to belong to that class which the statute requires shall be appealed, if at all, within forty days ; and to hold that such orders are so carried into the subsequent decree as to become part of it, and appealable with it, would seem to annul this statutory restriction. It seems to me the proper rule was the one suggested in the case of *Terhune v. Colton*, 1 *Beas.* 318, which is thus stated : “ That when the final decree involves the merits of the case, which had previously been settled by an interlocutory order, an appeal from the final decree, properly taken, brings the whole case before this court.” That rule appears to give a reasonable effect to the requirement of the statute limiting the time for appeals to interlocutory orders, and at the same time permits the whole merits of the case to come up to this court after a final hearing in the Court of Chancery. The operation of this rule is, to shut out from the hearing before this court, in the present case, all question as to the equitable legality of the Chancellor’s refusal to allow the defendant’s answer to be amended.

But, although the defendant was not permitted to amend his answer in the particular in question, an attempt was made by him, on the trial before the Vice-Chancellor, to gain the same end by another method. He first insisted that the complainant must prove its corporate existence, and its capacity to take lands by way of mortgage in this state ; and that effort failing, he offered to show that in making the loan

Butterfield v. Third Avenue Savings Bank.

upon which the mortgage rested, the complainant acted in violation of the laws of New York.

It will be observed that in his petition of appeal, none of these objections to the decree are particularly assigned. The complaint, as therein stated, is in general form, that the complainant's mortgage is held to be a valid lien. One of the grounds of exception now advanced is, that the Vice-Chancellor would not admit evidence going to a certain point. Such generality of objection would scarcely seem to be a compliance with the rule of this court requiring the "grounds of appeal" to be stated. The purpose of this provision is obviously to require a notice to the opposite party, of the points in the proceeding which are to be made the subject of complaint in the appellate court, and an indefinite statement of this kind will certainly, in a scant measure, effect that purpose. It will, no doubt, often happen in these trials before the Vice-Chancellor, and which are such entire novelties in the equity practice in this state, that many matters will arise to which exception will be taken. How far such matters, so called in question, are to be pointed to in the petition of appeal, it will be for the practicers in the court to consider, and for this court, in the future, as the case may arise, to finally decide. At present, it is sufficient to say that as this mode of proceeding in this particular was altogether unsettled, the objections taken in the respects in question, will, on this occasion, be considered by the court, without regard to this point of form.

Looking, then, at the questions raised before the Vice-Chancellor, I think none of them are to be resolved in favor of the defendant. The answer did not put the complainant upon proof, either of its existence as a corporation, or as to its ability to make the loan and take the security in question. The bill set up a mortgage duly executed as a valid lien on the mortgaged premises. The answer expressly admitted the making of this mortgage, of such date and of "such purport and effect" as was set forth in the bill. This was necessarily an implied admission of the legal existence of the complain-

Butterfield v. Third Avenue Savings Bank.

ant and its capacity to stand as mortgagee. The requisition of proof of the corporate existence or corporate capacity of a party, is usually a useless burthen, not to be imposed unless from the stringency of peremptory rules of pleading. Such proof will not be exacted unless made necessary by the form of the answer. This was the rule adopted recently, with respect to proceedings at law, by the Supreme Court in the case of the *Star Brick Company v. Risdale*, 7 *Vroom* 229.

It also seems to me that the ruling of the Vice-Chancellor, touching the offer of the defendant to prove that the complainant, in taking the mortgage in controversy, was acting in contravention of the laws of New York, was strictly correct. Such proof was not admissible, because it was not within any issue raised in the case. As has already appeared, the answer, so far from raising up any question on this point, expressly admits the original validity and legal effect of this instrument. It is not necessary to refer to authorities to show that the proofs must be confined to the contentions presented by the pleadings. Unless this be so, such pleadings are merely idle forms. Nor is there anything in the suggestion, that when it appears that an act has been done which is offensive to morals or public policy, a court will, *ex mero motu*, refuse to aid in its execution. The answer to this position is, that such fact does not appear in the present case, and cannot be made to appear, except by the violation of established modes of procedure. If it had come out on the part of the complainant, that in taking this mortgage, the laws of New York were violated, the question would have been presented, how far this court would have helped the consummation of the forbidden act; but there was no such disclosure on that side of the case, and when the defendant sought to introduce evidence to that effect, he was properly met with the bar, that in this endeavor he was going outside of the issues.

In my opinion, the decree appealed from should be affirmed, with costs.

Decree unanimously affirmed.

Phelps v. Morrison.

NOVEMBER TERM, 1874.

PHELPS, appellant, and MORRISON and others, respondents.

1. Under the statute of frauds of this state, a *bona fide* purchaser acquiring either a legal or equitable title to lands from a grantee, to whom the title has been fraudulently conveyed, will be protected against a judgment subsequently obtained against the fraudulent grantor.

2. In this case lands were conveyed by a husband, mediately to his wife, in fraud of his creditor. The wife, having the title, agreed to sell the lands to, and received the consideration from a *bona fide* purchaser, but did not make a valid title; a creditor then obtained a judgment against the husband and levied on the lands. *Held*, that the equitable title of the purchaser would be preferred and enforced in equity.

3. The statute of frauds, in this respect, discussed and construed.

The opinion of the Chancellor is reported in 9 *C. E. Green* 196.

Mr. Dixon, for appellant.

Mr. C. Parker, for respondents.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

This is a struggle between a judgment creditor and a person holding an equitable title to land, derived from a *bona fide* purchaser without notice. The facts, in brief, are these: In the month of July, 1871, the complainant, Edward A. Phelps, Jr., became a creditor of Daniel A. Morrison, one of the defendants. Morrison, at that time, was the owner of the premises in dispute, which were certain real estate in Jersey City; and being desirous of securing this property against the risks of his business, conveyed it, through the medium of a third party, to his wife in fee. Subsequently

Phelps v. Morrison.

the wife, on the 15th of April, 1872, executed a contract for the sale of this land, to one Andrew Allendorph, and thereby, for the consideration of \$6500, agreed to convey it to him in sixty days; and, accordingly, on the 10th of June following, she made conveyance, in compliance with her agreement. In this conveyance her husband did not join. After this Allendorph conveyed the property to one Bennett, the other defendant; but as this transfer was after bill filed and notice of *lis pendens*, it has no legal effect in the case.

I think the evidence must be taken to show conclusively that Allendorph purchased in good faith, and paid the consideration money when he got his conveyance, and that there was nothing in the transaction, or in the state of the title which he sought to acquire, which ought to have excited his suspicions or put him on inquiry. I shall assume, therefore, in applying the law to the facts of the case, that he was a *bona fide* purchaser, without notice of the rights of the complainant.

On the day of the execution of the conveyance just mentioned—that is, on the 10th of June, 1872—the complainant obtained a judgment, in the Supreme Court of this state, against the defendant, Daniel A. Morrison. And it is now claimed that, even on the assumption that the purchase by the defendant Allendorph was in good faith, this judgment constitutes a paramount lien on the property in question. The groundwork of this contention is, that Daniel A. Morrison, being in debt to the complainant, made a voluntary transfer of the title to the premises to his wife; that the legal title is still in the wife, her deed being invalid on account of the nonjoinder of her husband in its execution, and that, consequently, Allendorph, her grantee, acquired nothing but a mere equity, which cannot prevail against the legal force of the judgment against the husband.

It is certain that most of the propositions embraced in this argumentative series are indisputable. The conveyance by the husband to the wife, with the intent to place the land beyond the hazard of his business, could not stand, for a mo-

Phelps v. Morrison.

ment, against the assaults of the complainant, he being a creditor at the time of such arrangement. Such a transaction is, in law, regarded as a fraud, and the conveyance declared to be void by the express language of the statute for the prevention of frauds and perjuries. Such a title could have been vacated by force of the judgment of the complainant, either in a court of law or in equity, so long as the title, legal or equitable, remained in the wife, she being looked upon as a fraudulent grantee. In the absence of extraneous conditions, the complainant in the present case, could then have proceeded under his judgment against the husband, to sell the land, the title to which had thus been attempted to be transferred to the wife, and the purchaser at such sale would have acquired all the right in the premises which had been vested in the husband at the time he executed the forbidden conveyance. That such is the effect of the statute, has been often judicially declared in this state and elsewhere, and, therefore, requires neither elucidation by argument, nor authentication by the citation of authorities. Nor can the other proposition above stated, be considered as in any wise a debatable question. The present statutory law of this state does not permit, under ordinary circumstances, a married woman to execute a conveyance of her lands, unless such act be done with the co-operation of her husband. To this point, therefore, it is entirely clear that the argument of the counsel of the complainant is rested on solid ground. From these premises, indisputably tenable, the corollary is drawn that the legal propositions just referred to and declared to be correct, remain intact, and continue unaffected by the fact that an equitable right to these lands passed to Allendorph, he having purchased and paid his money in good faith. The point thus presented is not free from difficulty, and in the process of its solution embraces a consideration of the pertinent principles of equity, as modified by the positive rules of the statutable law of the state.

Upon the usual principles of equity, as administered in England and in this country, no one can doubt that the lien of a judgment at law upon lands, will not prevail against the

Phelps v. Morrison.

equity of a purchaser, who, before the rendition of such judgment, has, in good faith and without notice of anything wrong in the affair, paid his money. Under such circumstances, it has often been declared that the equitable will overcome the legal right. The reason of this rule was stated in the early case of *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, and has been many times reiterated, and was to the effect that there was a higher equity in favor of one who advances his money, by way of purchase or mortgage, in reliance upon a specific piece of property, than there is on the part of a general creditor who looks for his security to the entire estate of his debtor without having in his eye, when the debt is incurred, any specific part of it. Whatever may be thought of the validity of the reason thus announced, it is certain that the doctrine founded upon it is established by a long line of decisions of such weight and authority that no court would deem it open to discussion. Many of the adjudications referred to are collected in the American annotations appended to the case of *Basset v. Norworthy*, in 2 *Leading Cases in Equity*, page 108, (third Am. ed.) The proposition in question is stated in this learned note in these words: "It is, however, well settled that the acquisition of such a lien, (that is a lien by judgment,) although without notice, is not to be regarded in the light of a purchase, or as entitling the creditor to a preference over prior equities or unrecorded conveyances." The case of *Whitworth v. Gaugain*, 3 Hare 416, is also strikingly evincive of the great force and scope of the rule, for it was there adjudged that an equitable mortgagee of lands was entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, had, subsequently thereto, recovered judgment against the mortgagor and obtained actual possession of the lands by writ of elegit and attornment of the tenants. It is obvious that under the operation of this rule, if it prevailed in its full vigor, a purchaser who had innocently paid his money, relying on a promise that the land purchased would be conveyed to him, could enforce his equi-

Phelps v. Morrison.

table right to such land, as against any creditor subsequently obtaining a judgment lien thereon against the legal owner. The principle of the rule seems to be, that in such a situation of affairs, a court of equity will regard the title as vested by the agreement in the purchaser, on the ground that in that tribunal, whatever in conscience has been agreed to be done and ought to have been done, is regarded as having been actually done. On such a theory, of course there would be no title left in the vendor upon which the subsequent judgment against him could operate.

But it is evident, I think, that this equitable rule does not prevail, to its entire extent, in this state. Its efficacy has been very sensibly impaired, and its operation contracted within narrow bounds, by the provisions of the statutes which give a preference to judgments over unrecorded conveyances and mortgages. These enactments, by necessary implication, revoke, in a great degree, the rule in question, for it would seem quite absurd to hold, that the rights of a purchaser having taken a deed, but having failed to record it within the statutory period, shall be subordinate to the subsequent judgment, but that if he omits to take a conveyance, his equitable title will be paramount to such legal lien. Our act relating to the registration of mortgages, enacts that a mortgage shall "be void and of no effect against a subsequent judgment creditor," unless such mortgage shall be acknowledged or proved, and recorded or lodged for that purpose, &c., "at or before the time of entering such judgment;" and the act respecting conveyances contains a similar regulation with regard to such instruments, with the distinction that it gives them full effect, if recorded within fifteen days "after the time of signing, sealing, and delivering the same." In view of this system, it is obvious that the rule that the mere equitable title shall prevail over the lien of the judgment creditor subsequently acquired, must be considered as, in the main, abrogated. The legislative declaration, that the judgment shall have priority over the equitable right of the purchaser, even when such right has been evidenced and

Phelps v. Morrison.

corroborated by the transfer of the legal title, must, upon very plain grounds of right reason, have the effect of placing under the same subjection, the mere equity of the purchaser which is unattended by a conveyance. The plain purpose of the statute is to make, in the absence of registration, the legal right of the purchaser subordinate to the claim of the judgment creditor ; and as such legal right of the purchaser comprises and wholly absorbs his equitable right, it follows, as an inevitable conclusion, that the latter must stand in the same position of subordination. I have no doubt that this is the effect of these statutes upon the equitable rule under consideration. And this is the construction which has been put in other jurisdictions upon statutes tending to the same purpose. Among cases of this class, the following are illustrative decisions : *Davidson v. Cowen*, 1 *Devereux Eq.* 474 ; *Coffin v. Ray*, 1 *Metc.* 212 ; *Jaques v. Weeks*, 7 *Watts* 261 ; *Semple v. Burd*, 7 *S. & R.* 286.

The foregoing examination of the general rule in question, as enforced in courts of equity, through the change impressed upon it by the statutes of this state, leads us to this result : that if the judgment of the complainant is a lien at law, as is claimed, upon the premises involved in the controversy, such lien cannot be divested by the naked equitable right of the defendant, Allendorph. This will be at once evident, when it is remembered that such result would not have followed if this defendant had taken an actual legal conveyance, and had omitted to comply with the requisition of the statute exacting the recording of such conveyance. This seems to me so plain, that the only matter for consideration which appears at this point to arise, is, whether this judgment, under the force of the circumstances presented, has any effect, so as to lay a legal lien upon this land.

I have already stated that the judgment is against the husband, and that the legal title to the property is now in his wife, as his fraudulent grantee. If the case stopped at this point, there would be no question with respect to the lien of the judgment. It would clearly bind the land so that it could

Phelps v. Morrison.

be sold under it. But this effect does not proceed from the principles of the common law, for, under that system, the title being out of the judgment debtor could not be reached in the hands of his grantee, except by proceedings in equity. That the judgment against a debtor can be levied against lands aliened by him in fraud of his creditors prior to the rendition of such judgment, is an effect due exclusively to the operation of the second section of the statute for the prevention of frauds, which declares that every such conveyance shall "be clearly and utterly void, frustrate, and of no effect." The statute annulling the transfer of the title, the judgment becomes attached to the land as completely as though the fraudulent conveyance had not been made. Does this statutory rescission of the fraudulent conveyance occur in the present case?

My consideration of the subject has led me to the conclusion that it does not. I think, as between the complainant, the judgment creditor, and Allendorph, the equitable purchaser from the fraudulent grantee, the section of the statute just referred to is wholly inoperative. By the sixth section of the act, the rights of the *bona fide* purchaser are protected and preserved by being withdrawn wholly from the statutory operation. This clause, in substance, declares that the act shall not extend to, or be construed so as to impeach or make void, any conveyance made upon good consideration, and *bona fide*, to any person without notice or knowledge of the fraud tainting the transaction. This language is very comprehensive, and appears to embrace the equitable transfer to the defendant, Allendorph, from the wife of the judgment debtor. It is true, that in construing a similar provision in the statute law of New York, Chancellor Kent, in the case of *Roberts v. Anderson*, 3 Johns. Ch. R. 371, was of opinion that the clause under consideration did not protect a purchaser from the fraudulent grantee, but only such purchaser when he derived title directly from the fraudulent debtor himself. But this judgment was afterwards reversed in the Court of Errors, and a contrary construction

Phelps v. Morrison.

was established. In this latter court, the opinion expressed by Chief Justice Spencer, is characterized by nice discrimination and accurate reasoning, and places the subject on highly practical grounds; the inference that he draws being that the provision validates the title of the *bona fide* purchaser, whether such title has been taken immediately from the fraudulent debtor or more remotely from the grantee of such debtor. And this interpretation seems to me wholly consistent with both the spirit and language of the section construed. The terms used are general, and no reason appears why the design of the law maker should not be held to comprehend the class of affairs to which the present case belongs. Why should not the *bona fide* purchaser in the second degree in the line of conveyance from the debtor be protected, as well as the purchaser who stands in the first degree? The contention of Chancellor Kent, in the case just cited, that inasmuch as the second section of the act pronounces the fraudulent conveyance to be actually void, and that consequently no title passes to the grantee of the debtor, and that on this account he can transmit none, is manifestly fallacious, because the section referred to does not have the effect attributed to it. That section, taken in connection with section sixth, does not declare the fraudulent conveyance frustrate in all cases; but on the contrary, permits it to stand good in all respects, in favor of a *bona fide* purchaser. I think, under a reasonable construction, this was the effect of the clause in question as it stood originally on the English statute book, but that, at all events, such must be the reading of our own act. Our statute was framed by Judge Paterson, and that part which relates to fraudulent conveyances is mainly composed of the statutes of 13th and 27th *Elizabeth*. Each of these original acts has a proviso annexed to it, and these provisos are consolidated into the sixth section of the New Jersey statute. The first statute, being the 13th of *Elizabeth*, was designed to protect creditors against fraudulent conveyances; the latter statute, the 27th of *Elizabeth*, to protect purchasers against similar frauds. The former act, with respect to the question

Phelps v. Morrison.

in hand, does not appear to have been construed by the English courts; but in that country the law is settled, that by force of the latter act an innocent purchaser for a valuable consideration, from a fraudulent grantee, will be preferred to a subsequent purchaser from the grantor. This being the legal interpretation of the one statute, I have failed to see why the other is not to be read in the same sense. The language of the clauses in the two acts which annul the fraudulent conveyance, is identical; and the only difference on this subject, between the acts, seems to be in the terms of the provisos creating an exception in favor of *bona fide* purchasers. It would seem, therefore, that if the statutes can be construed differently, such discrimination must arise from the variation in the language of these provisos. But the reason for discrimination does not exist in the interpretation of our own act, because the provisos are blended, the more comprehensive terms being retained. My conclusion, consequently, is that already stated, that the statute for the prevention of frauds does not operate so as to annul or affect the title of the fraudulent grantee as against a *bona fide* purchaser from such grantee, and that a purchaser is within the immunity of the act if he has acquired either a legal or equitable title, and that under such conditions, a judgment against the debtor will not be a lien on the land conveyed. It is well to remark, that if a sale should take place under such judgment, a purchaser at such sale, without notice of equities existing in favor of parties disconnected with the fraudulent transaction, would stand, from manifest considerations, upon a different ground from that occupied by a judgment creditor. The present decree is right in holding that the title transmitted to Allendorph was not affected by the judgment in question.

The next objection arises out of that part of the decree which converts the equitable title to the fee, residing in the defendant, Allendorph, into a mortgage, and charging it as a lien upon the land in priority to the judgment of the complainant.

It is insisted that, under the bill and pleadings in this case,

Phelps v. Morrison.

there is no warrant in the practice of courts of equity for such a decree charging the property, by way of mortgage, with the amount of money paid by Allendorph. I have been unable to find any precedent, nor do I know of any principle, which would seem to justify a decree of this character. This defendant, Allendorph, is adjudged to be a *bona fide* purchaser; by what course of reasoning is it, then, that he is to be converted into a mortgagee? If he had bought the land in good faith, and it is not affected by the judgment of the complainant, I do not see how it, or any part of it, is to be withheld from him. Suppose the land should not bring the amount paid, is the wife, from whom he derives title, to be charged with the deficiency, or is this defendant to lose it? The wife is a mere voluntary grantee, and is guilty, not of a moral, but merely of a legal fraud; and it certainly may operate as a great injustice to her if the sale which she has made can be broken up, and the transaction turned into a loan to be secured on the land. The difficulty in considering the sale and transfer of title good for some purposes, and to alter its essential character for other purposes, seems to be insuperable. The decision in *Pentz v. Simonson*, 2 *Beas.* 232, rests upon correct principles, but it bears no analogy to the present case. There the bill was against the wife to compel her to execute a conveyance according to the agreement, she having received payment, in part, of the consideration money. The married woman refused to comply with her agreement, and the court decided that she could not be compelled to do so, but charged her separate estate with the moneys received. Would the court have done this if the married woman had insisted on her bargain, and had been willing to carry it into effect? And yet, this is what the married defendant in the present case does. In the reported case the court refused the complainant the benefit of his agreement to purchase because it had no power to enforce it; in the present case the court can enforce the agreement. It seems to me clear that the cases do not, in principle, even approach each other.

But still, although I am constrained to think the decree

Calame v. Calame.

in this particular erroneous, it does not seem to me that the complainant is in a position to call it in question. It does not appear, nor is it to be inferred, that he is injured by the error. Indeed, it looks as though, of necessity, it must redound to his benefit. If the decree had given the premises in fee to the defendant, Allendorph, they would at once have been placed out of the reach of the complainant; as it is, his judgment remains as the second encumbrance upon them. Nor do I think that the complainant can rightfully ask, in order to the validation of this decree against him, that a cross-bill shall be filed. Such an objection, it is probable, might have been successfully urged in behalf of Mrs. Morrison, but the complainant has prayed for a sale of the premises, and the Chancellor, of necessity, must adjust the order of the encumbrances upon it. Under the statute, no person but a party aggrieved by the decree can appeal from it to this court, and in neither of the matters specified does the complainant stand in that situation.

Upon the whole case, therefore, I am of opinion that the decree appealed from should be affirmed, with costs.

Decree affirmed by the following vote:

For affirmance—BEASLEY, C. J., DALRIMPLE, DEPUE, GREEN, LILLY, SCUDDER, WOODHULL. 7.

For reversal—BEDLE.

CALAME, appellant, and CALAME, respondent.

1. Under the statute of this state, alimony cannot be given in a gross sum, nor in a portion of the real estate of the husband.

2. An agreement in writing, made by a husband who had deserted his wife, to give her certain land and money, in lieu of all her claim upon him for maintenance, the offer having been accepted by the wife, will, on a divorce being granted, be enforced in equity.

Calame v. Calame.

This was an appeal from a decree made in accordance with the opinion of the Vice-Chancellor, reported in 9 *C. E. Green* 441.

Mr. Stone, for appellant.

Mr. Coult, for respondent.

The opinion of the court was delivered by

THE CHIEF JUSTICE.

The bill was brought in this case by the wife for a divorce from her husband, on the ground of his adultery. The fact of the defendant's guilt being fully proved, no question has been raised in this court on that point. The argument was confined to an examination of the principle on which alimony has been settled. The Vice-Chancellor, who sat in this case in the Court of Chancery, assigned to the wife in this respect, a certain part of the real estate of the husband in fee, and a specified sum of money in gross. This course was taken, as it was deemed to be in pursuance of the powers conferred by the ninth section of the act concerning divorces. (*Nix. Dig.* 247.)

After a careful consideration of the subject, I find myself unable to concur in this construction. This is an old law; it has been, in its present form, on the statute books for over fifty years, and it has never before received this interpretation. During this long period, although many cases must have arisen in which the power now claimed would have been highly useful, the practice has been entirely settled, the uniform course being to give the wife an allowance of money in periodical installments. This fact seems to me to show, very strongly, what the sense of the profession and of the bench has been on this subject. And I think the language and entire frame of the section has produced this generally prevailing opinion. Its language is this: "When a divorce shall be decreed, it shall and may be lawful for the Court of Chancery to take such order touching the alimony and main-

Calame v. Calame.

tenance of the wife, and also touching the care and maintenance of the children, or any of them, by the said husband, as from the circumstances of the parties and the nature of the case, shall be fit, reasonable, and just." Now, the terms alimony and maintenance, are emphatically technical words, having for ages borne a fixed and established meaning, and they never have been held to comprise, within their legitimate signification, an allowance of a portion of the husband's estate in fee. It is not pretended that there is any expression in this law which tends to show that these words have been used in a different sense from that which, as terms of art, they carry with them; and such being the case, it seems to me that, upon general principles, they must be held to embody simply their technical signification. Nor do I find any part of the context of this act which lends a wider meaning to them. It is urged that an inference on this side may be drawn from the fact that, as the wife, by the divorce, will be cut off from her claim to dower, it must have been the intention that some part of her husband's real estate should be allotted to her. It is not necessary to express any opinion on the question whether a decree for divorce *a vinculo matrimonii*, will have the effect, in this state, which is assumed in this contention. The point was settled the other way, in a case receiving great consideration from the Court of Appeals in New York, the statute of that state being, perhaps, not substantially variant from our own. *Wait v. Wait*, 4 *Comst.* 95. But, on the assumption of such deprivation, what follows? not, as I think, that, in hostility to the terms which have been used, a portion of the real property is to be given to the wife, but that her loss, in this respect, may have the effect of increasing the amount of her alimony. Thus justice can be done without forcing the terms from their technical import. Nor can I perceive the force of the argument that, as these terms have acquired their meaning from having been applied to divorces from bed and board, they should have a wider scope when applied to divorces from the bond of matrimony. How is a change of meaning to be implied, when the language under-

Calame v. Calame.

stood technically, is certainly not inapt when used in either connection? We may think that it is advisable to give the wife, when divorced absolutely, a part of the land, but may not the legislature have thought otherwise? And, unless we can say that such a purpose is highly improbable, it does not seem to be within the legitimate scope of construction to reject the long established meaning of the words of the act. Besides, by attempting to do so, we are led into this incongruity, that, in order to stretch the meaning of the words in question, in their application to general divorces, we must also stretch it with respect to limited divorces. The clause under consideration relates to both kinds of divorces, so that, if land can be awarded as alimony where there is a divorce from the bond of matrimony, it can where there is a mere separation from bed and board. This result alone would seem to be sufficient to demonstrate the inadmissibility of the interpretation in question. In aid of this view, I will, in conclusion, point to the fact, that the modes appointed by the act to enforce the payment of the alimony, such as requiring security from the husband, and authorizing the sequestration of his personal estate, and the rents and profits of his real estate, appear to stand in opposition to the idea that a part of the land itself can be set apart for the wife. In fine, as the legislative language, putting upon it its well settled meaning, will not lead to any absurd or unreasonable result, in my opinion the section must be held to import that, where an allowance is made under its authority, such allowance must be alimony—that is, money payments of the character of an annuity.

But notwithstanding these views, I think the decree is right and should be sustained. It appears in the case, that after the husband had deserted his wife and while he was living in a state of adultery, he offered, in writing, to turn over to the wife the land in question, and to pay to her the sum of money which the decree awards to her. The wife accepted, in writing, this offer. The bill sets up this arrangement and asks that it be carried into execution. Why should not this be done? It is true that according to the course of

Calame v. Calame.

English equity, the court cannot enforce an agreement of the husband and wife to live apart, but it is equally true, and is established by an unbroken current of authorities, that such court will enforce such agreement, a trustee being a party to it, for the payment of separate maintenance, according to its stipulations. Sir William Grant, in the case of *Worrall v. Jacob*, 3 *Mer.* 268, adverts to the singularity that while the court refuses to carry the articles into effect with respect to the separation, it will nevertheless put in force the accessorial agreement for the support of the wife. But, however incongruous the practice may be, as I have said, it is absolutely settled and indisputable. 2 *Roper* 284. In the case of *Emery v. Neighbour*, 2 *Halst. R.* 144, the doctrine is referred to as the admitted law. If, therefore, in the present case, a trustee had been a party to this agreement, the equitable validity of it could not have been drawn in question. The inquiry therefore presented is, as to the effect of this contract made directly between husband and wife. Undoubtedly the general rule is clear, that at common law a contract made between married persons will not be binding either in equity or in a court of law. Thus in *Coke Litt.*, 3 *a*, it is said a husband cannot make a grant or conveyance directly to his wife during coverture. And there are many decisions in which Chancellors have declared that they could not lend assistance to such deeds or to kindred acts. But this rule, although of great prevalence, was not absolutely inflexible, for on some occasions it would bend in favor of equities. There are many cases exemplifying this deviation. In *Lucas v. Lucas*, 1 *Atk.* 270, Lord Hardwicke refers to several instances of gifts between husband and wife which had been supported, and the doctrine was signally enforced by Lord Eldon, in the case of *Lady Arundell v. Phipps*, 10 *Ves.* 146. But for present purposes, the most important case of this class, inasmuch as the principle on which it is decided bears a close analogy to the case under consideration, is that of *Shepard v. Shepard*, 7 *Johns. Ch.* 57. A conveyance of certain lands had been made by the husband immediately to the wife, and Chancellor

Calame v. Calame.

Kent pronounced in favor of the validity of the gift, on the ground that its purpose was to make a *provision* for the wife.

Nor are the books destitute of authorities directly in point. *Head v. Head*, 3 Atk. 547, is of this character. The facts were these. The husband wrote to the father of the wife that he was willing to pay for the support of the wife a certain annual sum, so long as they should live apart, and the agreement for the support was enforced by Lord Hardwicke. *More v. Freeman*, Bunbury 205, and *Guth v. Guth*, 3 Bro. C. C. 614, are to the same purpose; and in *McKenna v. Phillips*, 6 Wharton 572, a decision was made, resting on the same basis. In the case of *Frampton v. Frampton*, 4 Bear. 294, Lord Langdale alludes to this subject, and thus expresses his views: "But the cases of *Fitzer v. Fitzer*, 2 Atk. 512, and *Cooke v. Wiggins*, 10 Ves. 191, have not been overruled, and I am not aware that it has ever been decided, and no case has been adduced to show, that without the intervention and covenant of a trustee, the husband may not voluntarily execute a deed, or create a trust in favor of his wife, and that such deed or trust may not be binding as against him, even if the benefit of that deed or trust be made dependent upon an existing or continuing separation, which was the principal, if not only inducement, for the whole arrangement." I am aware that in the English courts the case of *Guth v. Guth*, just cited, has been incidentally criticised, but I do not find that it has been overruled, and the criticism in question seems to arise out of the difficulty of regarding as enforceable, in the courts of that country, these contracts for maintenance in the absence of a trustee, from the circumstance that the grounds of the separation cannot be looked into, nor the agreement to separate be approved, inasmuch as cognizance over such matters resides in the ecclesiastical courts. But no such obstacle impedes the course of equity in this state, as, in this class of cases, the power to pass upon the propriety of the separation and on the validity of the agreement for maintenance, is possessed by the same court, and can be regulated in the same decree.

Lounsbury v. Locander.

Upon this branch of the case, then, my deduction from these principles and decisions is, that it was within the competency of equity to enforce, as a part of the decree of divorce, the agreement made, in lieu of alimony, between the complainant and defendant. I do not mean, however, that every agreement which is thus made will be supported. The court should undoubtedly look into these arrangements and their surroundings; but, when it appears that the separation of the wife, forming the groundwork of the agreement, was justifiable, and the provision is suitable, to this extent it is, in my judgment, safe to say that the contract should be upheld. These conditions being present in this case, I shall vote to affirm this decree, with costs.

Decree unanimously affirmed.

LOUNSBURY, appellant, and LOCANDER, respondent.

1. In every contract for the sale of lands, an agreement is implied to make good title, unless that liability is expressly excluded. The estate which the purchaser bargained for, whether in fee simple, or for a lesser interest, will be ascertained from the terms of the agreement, or if the agreement be silent in that respect, from the circumstances attending the transaction. For such estate, whatever it may be, the purchaser has a right to a good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give.

2. The vendor will not, either at law or in equity, be deemed to have complied with his contract by tendering a conveyance in legal form with such covenants (if any) as were stipulated for in the agreement, if, in fact, he has not the title which he contracted to sell.

3. As a general rule, an agreement to convey, means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate.

4. A stipulation that a party shall have the privilege of purchasing, is equivalent to an agreement to convey, and will entitle him to a conveyance at least, of all the estate the other party had at the time of the contract.

5. The legal effect of an agreement made by a grantee with the grantor, executed after the conveyance, but which was, in fact, part of the original

Lounsbery v. Locander.

arrangement under which the conveyance was made, that the grantor should have the refusal of a specified part of the premises conveyed, at the same rate per acre that he received for the whole, in a suit to enforce such agreement by the grantor, is that of a contract to reconvey the same title to the premises as the grantee acquired under his deed, free from any charges or encumbrances to which the same may have been subjected by such grantee whilst he was owner.

6. Under a contract to convey, equity will not compel the vendor to enter into any covenants for title, where no defect in the title is disclosed, in the absence of any stipulation that the purchaser shall have a conveyance with such covenants.

7. The general doctrine in equity is, that a purchaser, on a bill for specific performance filed by the vendor, will not be compelled to accept compensation or indemnity; and that on a bill by the purchaser, a vendor will be required to allow compensation, in case he is able to make title for a part, but not for the whole, if the purchaser consents to accept part performance with such compensation.

8. But a court of equity will not compel the vendor to give indemnity except under extraordinary circumstances, or decree a covenant of indemnity against him, unless the parties have contracted for it.

This was an appeal from a decree made in accordance with the opinion of the Vice-Chancellor, reported in 9 *C. E. Green* 418.

Mr. English and *Mr. Williamson*, for appellant.

Mr. Blake, for respondent.

The opinion of the court was delivered by
DEPUE, J.

The bill in this case was filed for the specific performance of a contract to convey lands. The Chancellor, on the advisory opinion of the Vice-Chancellor, signed a decree, directing a conveyance on the conditions mentioned in the contract. This result was, in all respects, so manifestly right, that after the opening by the appellant's counsel, this court refused to hear further argument on that point.

The only point on which we thought it necessary to hear counsel, was with respect to the form of the decree.

Lounsbery v. Locander.

The complainant and one Charlotte H. Staples, were the owners of a tract of land in the county of Union, known as the Pierson Farm, and containing about fifty acres, which, by a deed bearing date on the 13th of September, 1866, they conveyed to the defendant.

An agreement was entered into between the complainant and the defendant, which bears date on the 16th of April, 1867, whereby, for an adequate consideration, it was agreed that the complainant should have the refusal, for a specified time, of a five acre lot of the Pierson Farm in Cranford, New Jersey, at the bend of the Rahway river, at the rate of two hundred dollars per acre ; interest, taxes and expenses added. The agreement is set out in full in the opinion of the Vice-Chancellor.

The prayer of the bill is, that the defendant be decreed to sell and convey the premises unto the complainant "by a good and sufficient deed of conveyance, containing the several full covenants and warranty for the conveying and ~~assuring~~ of a perfect title in fee simple, free from all encumbrances." The decree signed is in conformity with the prayer of the bill.

The inquiry whether this decree is proper in form, is independent of the question as to the nature of the title the complainant has a right to under the agreement for purchase.

In every contract for the sale of lands, an agreement is implied to make good title, unless that liability is expressly excluded. 1 *Sugden on Vendors*, 8 *Am. ed.* 24, [16.] The estate which the purchaser bargained for, whether in fee simple, or for a lesser interest, will be ascertained from the terms of the agreement, or if the agreement be silent in that respect, from the circumstances attending the transaction. For such estate, whatever it be, the purchaser has a right to a good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give. This right does not grow out of the agreement between the parties, but is given by law, and the purchaser may insist upon it, not because it is stipulated for in the agreement, but on the general right of a purchaser to require it. *Ogilvie v.*

Lounsbery v. Locander.

Foljambe, 3 *Mer.* 53. The vendor will not, either at law or in equity, be deemed to have complied with his contract, by tendering a conveyance in legal form with such covenants (if any,) as were stipulated for in the agreement, if, in fact, he has not the title which he contracted to sell. *Johnson v. Smoch*, *Coxe* 106; *Conover v. Tindall*, *Spencer* 513; *Tindall v. Den*, *Spencer* 214; *S. C.*, 1 *Zab.* 651; *Bowen v. Vickers*, 1 *Green's Ch. R.* 525; *Young v. Paul*, 2 *Stockt.* 401. These cases cited from our own reports, establish the law in this state, and are in harmony with the decisions in most of the courts of our sister states. The cases elsewhere will be found by reference to the note to 2 *Sugden on Vendors*, 8 *Am. ed.* 231, [574,] and in *Rawle on Covenants*, 4th *ed.* 40. The opinion of Justice Ford, in *Barrow v. Bispham*, 6 *Halst.* 110, seems to incline to a different view. But in that case, as was shown by Chancellor Pennington in *Bowen v. Vickers*, the vendee bargained only for a qualified title, and he obtained by the deeds everything he contracted for.

The estate the complainant was to have, in case he accepted the option to purchase, is not mentioned in the agreement. As a general rule, an agreement to convey means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate. *New Barbadoes Toll Bridge Co. v. Vreeland*, 3 *Green's Ch. R.* 157. A stipulation that a party shall have the privilege of purchasing, is equivalent to an agreement to convey, and will entitle him to a conveyance at least of all the estate the other party had at the time of the contract. *Hawralty v. Warren*, 3 *C. E. Green* 124.

This agreement, I am satisfied from the evidence, was part of the original arrangement under which the farm was conveyed to the defendant, and was afterwards put in writing, and dated as of the time when it was actually signed. The title the defendant acquired by the conveyance from the complainant and Mrs. Staples, was in fee, and the price at which he agreed to re-convey the part to the complainant, is at the same rate per acre as he paid for the entire farm when

Lounsbery v. Locander.

he purchased it. Taking into consideration the fact that the complainant was one of the grantors of the deed to the defendant, the legal effect of the agreement is that of a contract to re-convey the same title to the premises as the defendant acquired under his deed, free from any charges or encumbrances to which the same may have been subjected while he was owner.

Thus far, the case is clear. The mooted question is, whether a court of equity, in executing a contract to convey, will compel the vendor to enter into any covenants for title, in the absence of a stipulation that the purchaser shall have a conveyance with such covenants. It will be observed by recurring to the principles hereinbefore adverted to, that this question is distinct from that of the kind of title the purchaser may require. If the circumstances show that he bargained for a complete title, he is not compelled to accept an imperfect title, although the vendor offers a conveyance with the most ample covenants for title and of warranty. Is he entitled to covenants, where no defect in the title is disclosed, and where he has not bargained for such indemnity in addition to a conveyance of the land?

Covenants for title are not a necessary part of the conveyance, but are distinct from, and collateral to, the transfer of title. A deed of bargain and sale, in legal form, will operate to effect a complete transfer of the title to the grantee. If covenants be added, they will not enlarge the estate, or pass any greater estate than is expressly conveyed by the granting part of the deed. *Adams v. Ross*, 1 *Vroom* 505.

It would follow, as a logical conclusion, from the fact that covenants for title are not essential to the conveyance, that, in a court of law, a deed of bargain and sale, without covenants, would be performance of a contract to convey in cases where covenants are not stipulated for. *Nixon v. Hyserott*, 5 *J. R.* 58; *Van Eps v. Schencctady*, 12 *Id.* 436; *Dodd v. Seymour*, 21 *Conn.* 476; *Potter v. Tuttle*, 22 *Conn.* 512; *Kyle v. Kavanagh*, 103 *Mass.* 356. A power of attorney, authorizing an agent to sell and convey, only empowers him

Lounsbery v. Locander.

to convey by a deed of bargain and sale, and he cannot bind his principal by covenants of warranty. *Howe v. Harrington*, 3 C. E. Green 495.

If a court of equity can require something more than would be esteemed performance in a court of law, the power must be derived from some principle or rule of practice peculiar to that jurisdiction.

The general doctrine in equity is, that a purchaser on a bill for specific performance, filed by the vendor, will not be compelled to accept compensation or indemnity; and on a bill by the purchaser, a vendor will be required to allow compensation, in case he is able to make title for a part but not for the whole, if the purchaser consents to accept part performance with such compensation. But a court of equity will not compel the vendor to give indemnity, except under extraordinary circumstances. In *Young v. Paul*, 2 Stockt. 401, this court decreed specific performance by a vendor, with indemnity against the inchoate right of dower of his wife, who refused to join in the conveyance. In *Milligan v. Cooke*, 16 Ves. 1, Lord Eldon also made a decree for indemnity on specific performance. In both these cases the indemnity decreed was not by mere personal security, but by mortgage on real estate. In both cases the power of a court of equity to decree indemnity was regarded as unquestionable. In the former case it was exercised on the ground that the refusal of the wife to unite in the conveyance was continued by the husband to deprive the complainant of the benefit of a specific performance of the contract. In the latter case the vendor could not make the title as perfect as he had covenanted, and indemnity was resorted to as a means of compensation for a contingent encumbrance which clouded the title. These are the only exceptions. In other respects the doctrine of the courts is unyielding, that a covenant of indemnity will not be decreed against a vendor, unless the parties have contracted for it. *Balmano v. Lumley*, 1 V. & B. 224; *Aylett v. Ashton*, 1 Mylne & Cr. 105.

The right of the complainant to indemnity by personal

Lounsbery v. Locander.

covenants, cannot be vindicated under either of these exceptions. It has not been suggested that the title the defendant had when the agreement to convey was made, has been in any manner encumbered or impaired. Nor is it alleged in the answer that his wife refuses to join with him in making a perfect title. Unless it is set up in the answer that the wife refused to unite in the conveyance, it is quite a matter of course to decree a conveyance. *Hall v. Hardy*, 3 P. Williams 187. If, on a reference to a master to report on the title, it shall be found that the title bargained for is imperfect, or that the defendant is incapable of making a proper conveyance, the Chancellor may then decree compensation or indemnity as the circumstances disclosed may demand.

The construction of contracts is the same in courts of equity as in courts of law. In both forums the one party is entitled to have, and the other bound to give, precisely what has been contracted for. The mode of procedure may shape the remedy, but the end to be attained is the same.

To hold that a purchaser shall have a right to usual covenants will involve the execution of contracts of this kind in uncertainty. What are usual covenants is a matter of doubt. Full covenants of warranty are quite as common, if not more so, than qualified covenants extending only to the acts of the grantor. And, if it be said that covenants of some kind are generally inserted in deeds of conveyance, it may also be said that it is quite as common practice to specify in the agreement that covenants, and what covenants, shall be given. If the purchaser desires to be protected by covenants it is easy to stipulate for them, and it is better to leave the subject as a matter of contract between the parties.

A decree for a conveyance by a deed of bargain and sale will give to the complainant all he contracted for, after the title has been ascertained to be such as was bargained for. To add thereto covenants not stipulated for, which are not necessary to effect a transfer of the estate, will give him what his agreement calls for, and something beyond.

The decree is more comprehensive in terms than is war-

Graydon's Executors v. Graydon.

ranted by the agreement, and should be varied in that respect. To amend it in form, a reversal is necessary. As the objection is formal, and probably, under the circumstances of this case, purely technical, the reversal should be without costs.

The whole court concurred.

GRAYDON'S EXECUTORS, appellants, and GRAYDON and others, respondents.

1. In order to ascertain testator's intention as expressed in his will, the whole will, so far as it in any wise relates to the subject matter in question, must be read together.

2. The question is not what the testator supposed he had done or intended to do, aside from the language of the will. It is the duty of the court to construe the will in the light of the terms used and give to them their legal and natural import.

3. The heir-at-law will not be disinherited, nor forfeiture of an estate decreed, except upon words free from doubt.

The opinion of the Chancellor is reported in 8 C. E. Green 230.

Mr. C. H. Voorhis, for appellants.

Mr. M. M. Knapp, for respondents.

The opinion of the court was delivered by
DALRIMPLE, J.

It was held by the Chancellor in this case, and I think rightly, that the deceased, Samuel Graydon, died intestate as to his real estate, and as to all that part of his personal estate in moneys and securities, except the money legacy and annuity mentioned in the second and third items of the will. In the fifth item, directions are given for the investment and payment over of that part of the estate embraced in that item

Graydon's Executors v. Graydon.

not including lands, moneys or securities. One-fourth is given to each of testator's children and their descendants. The share of John is made subject to the provisions and limitations contained in the eighth item, which declares that in case John shall marry a certain person described, before December 1st, 1879, that then he shall take no part of the estate, either of principal or interest, and that the provision thereinbefore made for him, is made upon condition that he do not marry said person before the time named, and if he do so, such provision is declared void and revoked; and further, that in case he do marry the person named before the time specified, then the executors shall dispose of the estate as if John were dead in the lifetime of the testator intestate, and without issue, but subject in other things to the provisions of the will. The question presented in reading these two items of the will is, whether John, by his marriage contrary to the provision of the will, has forfeited as well his right as legatee, as his right as heir-at-law and next of kin, to that part of the estate of which his father, the testator, died intestate? In order to ascertain the testator's intent in this regard, the whole will, so far as it in any wise relates to the subject matter in question, must be read together.

I think the plain, natural import of the words used is that, in case John contracts the prohibited marriage, he shall forfeit only that part of the estate given him and his descendants by the will. In no part of the will, save one which will hereafter be noticed, does the testator give directions as to the disposition of any part of his estate, except that willed in item five; and, in my opinion, it would be a strained construction, to make the eighth item, which contains the clause of forfeiture, relate to any other property except that with which the testator was dealing in and by his will. I see no warrant for holding, on the language used, that he then had in his mind that part of his estate not embraced in the will. If conjecture might be indulged, we might readily enough, perhaps, conclude that the testator intended to dispose of his whole estate, and supposed that he had done so, and that

Graydon's Executors v. Graydon.

John and his descendants were given one-fourth of the whole, subject to forfeiture, if the prohibited marriage was contracted. But the question is not what the testator intended to do, or supposed he had done, aside from the language of the will. Our duty is to construe the will in the *light* of the terms used, and give to them their legal and natural import. The conclusion to which I have come is, I think, fully warranted by a careful reading of the eighth clause of the will, either by itself or in connection with the fifth clause. The directions are that, in the event named, John shall take no part or share of the estate, either of principal or interest, and that the provision thereinbefore made for him is upon condition that he do not marry the person described within the time named; if he do, then such provision is declared void, and revoked.

If the clause ended here, I think it would be very clear that it related only to the provision thereinbefore made for John. The words, "principal and interest," cannot be made to refer to lands, and it is evident, from the words used, that the testator did not suppose he was dealing with any part of his estate other than that from which he had just before made "provision" for his children. But stress is laid on the concluding words of the clause, which are that, in the event named, the executors are ordered to dispose of the estate as if John were dead in the lifetime of testator intestate, and without issue, but subject, in other things, to the provisions of the will. I do not think this latter clause can be extended in meaning or effect, beyond the first. By the first clause of the item or section, the testator had named an event, on the happening of which, the gifts made to John should be recalled. By the second clause, he declares the mode of the disposition of these gifts when so recalled. It would certainly be a forced and strained construction to hold that, in the first clause of the eighth item, the testator is dealing with the "provision" which he had made for John, and in the second clause he refers to property not affected by the will, and from which no "provision" had been made for John or any other of testator's children.

Graydon's Executors v. Graydon.

It has been suggested that the sixth item of the will shows that the testator did not die intestate as to any part of his estate. That item says that if all testator's children shall die before a division of the property be made under the fifth item, leaving no lawful issue, then, and in that case, all the said rest of the estate, including said moneys and securities and real and personal estate of every kind and nature, shall go to testator's brothers and sisters. The only effect of this item is to make a general disposition of all testator's real and personal estate, in the event of all his children dying without issue before a division is made, not of all his estate, but of the property under foregoing provisions, which provisions do not refer to the lands or testator's moneys or securities. The most that can be said of it is that in a certain event, which has not happened, the testator has made disposition of all his estate. It may here be remarked that when, in this sixth item, testator refers to his entire estate, he uses terms comprehensive, apt and proper to embrace the whole. His failure to do so in the eighth item is, if we confine ourselves, as we must do, to the words of the will, an additional reason for the inference that he thereby intended to refer only to that part of his estate, out of which he had made provision for his children. The heir-at-law will not be disinherited, nor forfeiture of an estate decreed, except upon words free of doubt. 1 *Redfield on Wills*, p. 434, § 18. Such words we do not find in the will before us, and it must therefore be held that, as to that part of the estate not passed by the will, John Graydon takes his equal share as one of the children and heirs-at-law of the deceased. It will be perceived that this construction of the will makes the words "but subject in other things to the provisions of this my will," at the end of the eighth item, refer to the share of John under the fifth item, and not to the whole estate. The brothers and sisters of John will, therefore take, under the will, equal shares of the forfeited or lapsed estate by way of addition to the shares given them, and subject to the same directions and limitation annexed by the will to these shares. The result, in respect to this part of the estate, seems to carry

Easton and Amboy R. R. Co. v. Inhabitants of Greenwich.

out the intention of testator, so far as we can judge from the words used, and is in better harmony with the scope and object of the will than the construction adopted by the Chancellor.

The construction of the will by the Chancellor, in other respects, is, for the reasons assigned by him, adopted by this court.

The decree must be reversed and made in conformity with the views above expressed.

Decree reversed by the following vote:

For reversal—BEASLEY, C. J., BEDLE, CLEMENT, DALRIMPLE, LATHROP, LILLY, WOODHULL. 7.

For affirmance—DODD, GREEN, SCUDDER, VAN SYCKEL. 4.

THE EASTON and AMBOY RAILROAD COMPANY, appellants, and THE INHABITANTS OF THE TOWNSHIP OF GREENWICH, IN THE COUNTY OF WARREN, respondents.

1. Township authorities upon which devolves, by law, the duty of keeping the public highways in good order and repair, and which are liable to indictment for failure or neglect to perform such duty, have such special interest beyond the public at large in the highways, as entitles them to file a bill in their own name, to restrain the shutting up or rendering impassable such highways.

2. It is not necessary to the maintenance of such suit, that special authority be given to the authorities by a meeting of the inhabitants of the township in town meeting assembled. The power and duty of defending the rights of the township reside in some of its officials, without the necessity of convening a town meeting to authorize the institution of every particular suit.

3. It will be presumed in such proceedings as the present, that the solicitor and counsel who filed the bill, had full authority to commence the suit.

4. Under a clause contained in their charter, that if a railroad company shall find it necessary to change the location of any portion of any turnpike or other public road, they are authorized and empowered so to do and to

Easton and Amboy R. R. Co. v. Inhabitants of Greenwich.

occupy such portions of the turnpike or road as they may deem necessary or expedient, &c., the company are not the sole judges of the necessity or expediency of changing the location, &c. They have not the power to change the location whenever they shall decide that it is necessary or expedient, but only when the necessity, in point of fact, exists.

This was an appeal from the decree of the Chancellor ordering that an injunction issue pursuant to the prayer of the respondents' bill, except that the defendants should not be enjoined from such temporary obstruction of the highway in question as might be reasonably and necessarily incident to constructing a suitable culvert over the same.

The opinion of the Chancellor is reported in 9 *C. E. Green* 217.

Mr. T. N. McCarter, for appellants.

The opinion of the court was delivered by

DALRIMPLE, J.

The bill in this case is filed by the inhabitants of the township of Greenwich, in the county of Warren, in their corporate capacity. The object of it is to prevent the defendants obstructing and changing the location of one of the public highways of said township.

The defendants' defence upon the merits is founded on a supplement to their charter, approved April 2d, 1873. (*Laws of 1873*, p. 1324.) The third section of that act enacts that if the said company shall find it necessary to change the location of any portion of any turnpike or other public road, they are authorized and empowered to do so and to occupy such portions of the turnpike or road as they may deem necessary or expedient, and in such case they shall cause the changed portion of such turnpike or public road, to be reconstructed at their own expense, in as perfect a manner as the original road or turnpike, and pay all damages done to real estate by such removal of roads and turnpikes. The defendants contention is, that by this enactment, the power is given to them

Easton and Amboy R. R. Co. v. Inhabitants of Greenwich.

to judge whether in the construction of their railroad, there exists a necessity or expediency of changing the location of a highway, and that their action in the premises is final and conclusive.

Before considering the legality of this defence, it will be necessary to notice and dispose of certain preliminary objections which the defendants have raised to the complainants' claim to relief.

It is said, in the first place, that the complainants cannot maintain this suit, because they have no special interest beyond the public at large, in the subject matter of the controversy. If they have no such special interest, it must, I think, be conceded that the proceeding should have been instituted by the Attorney-General in behalf of the public. It is familiar law, that the duty of keeping in good order and repair public highways, rests upon the township, and they, in their corporate capacity, are liable to indictment for failure or neglect to perform such duty. The complainants would, therefore, be indictable, and punishable by fine and costs, if they should suffer, or permit the defendants, without legal justification, to shut up and render impassable the highway in question. Nor is the force of this consideration at all affected by the statute which gives the township, in case of fine or amercement for badness, want of repair, or deficiency in the highways, indemnity by action against the overseer, within whose limits the nuisance shall be or happen. It is enough to say, that the township is liable for the performance of the imposed duty, and, in my opinion, is authorized, on this ground alone, to intervene and prevent the doing of a act which is at once especially injurious to itself, and detrimental to the public at large. I think it would be anomalous to hold that a municipality, liable to indictment for the impassability of its highways, has no right, as against a wrong doer who threatens to create the nuisance, to invoke the aid of a court of equity to prevent the threatened mischief. Its right to do so, I think, is so clear on admitted principles of equity and justice, that the citation of authorities, in its sup-

Easton and Amboy R. R. Co. v. Inhabitants of Greenwich.

port, is not needed. I may, however, say, that in the case of *Inhabitants v. Connecticut River R. R.*, 4 *Cushing* 63, cited by the Chancellor in his opinion in this case, it was held by the Supreme Court of Massachusetts, Chief Justice Shaw pronouncing the opinion of the court, that the town, inasmuch as it was responsible for the construction and amendment of highways and town ways, and for damages to travelers for losses occasioned by obstructions and defects, had a right to invoke the equity power vested in the court in cases of nuisance, to determine whether such a use of ways as was claimed by the defendants in that case, was, or was not, a justifiable act under the powers granted them.

The remaining preliminary objection is that, assuming that the township may maintain a suit on the facts alleged in this bill, the present suit must fail, because it has not been authorized by a meeting of the inhabitants of the township in town meeting assembled. This point is made in the answer, and the same benefit of it prayed as if it had been made by demurrer. But I think it must be held that the power and duty to defend the rights of the township reside in some of its officials, agents, or attorneys, without the necessity of convening a town-meeting to authorize the institution of each particular suit. I am not aware of any statutory provision for convening a special town meeting for such purpose. Without now attempting to consider or decide whose duty it is, under circumstances like those on which the present proceedings are based, to initiate suit, I think it must be presumed that the solicitor and counsel who filed the bill, had, by virtue of a general retainer, or otherwise, full authority so to do. Before leaving this point, it may be further observed, that we are asked to dismiss this bill, not upon a general objection that it has been filed without authority, but upon the narrow and technical ground that the suit has not been authorized by a meeting of the inhabitants. If, as the answer alleges, the town committee ordered the suit, the presumption is that they had the power in fact, if not in law, to do so. Whether this objection can be properly raised by answer or

Easton and Amboy R. R. Co. v. Inhabitants of Greenwich.

demurrer, need not now be decided. Vide *The Inhabitants, &c., v. Booraem*, 5 Halst. 257.

The resolution of these preliminary points in favor of the complainants, brings us to a consideration of the main question in the case. Does the act of 1873, above referred to, make it lawful for the defendants to occupy the site of a public road, and change the location thereof, whenever they shall decide that it is necessary or expedient for them to do so? I think that the defendants' contention that such is the proper construction of the act, cannot be supported. They may exercise the power conferred, not when they simply decide to do so, but when the necessity, in point of fact, exists. If it can be shown that there is no such necessity, the right does not arise. An attempt to exercise the right without the necessity contemplated by the act, will be prevented. The fatal defect in the defence is, that it does not show that any such necessity for the proposed change in the highway exists. No facts from which it can be inferred, are stated in the answer or in the affidavits attached thereto. The court is asked to accept the opinions and conclusions of engineers and other witnesses, without being possessed of the facts and circumstances on which they are based. The defence seems to be put solely on the alleged finality of the decision of the company, its agents and employees. I do not think that the true reading of the act is that, whenever the defendants shall decide to change the location of a public road, the necessity for such change must be held to exist; neither the letter nor spirit of the act authorizes such construction. This view of the case renders it unnecessary to decide what is the precise limit of the power conferred. Whether the necessity for a change of location of a public road must, as seems to be held by the Chancellor, be an absolute necessity to make the change, in order to construct the railroad, or need only be that reasonable necessity which arises when, without the proposed change, the company would be seriously inconvenienced, or put to great and unreasonable expense, is a question upon which no opinion need be intimated.

Ackerman v. Blauvelt.Bowlby v. Bowlby.

It is only necessary to observe, in conclusion, that the complainants aver and prove, that no necessity for the proposed change of route exists, while the defendants have not shown the contrary.

The complainants are entitled to an injunction. They have not lost their right to it by laches, acquiescence, or because, before the filing of the bill, a portion of the highway proposed to be changed had been occupied by the defendants as a crossing for their railroad or otherwise, and thus rendered impassable.

The decree or order appealed from must be affirmed, with costs.

Decree unanimously affirmed.

ACKERMAN, appellant, and BLAUVELT, respondent.

Decree affirmed upon the grounds stated by the Vice-Chancellor in his opinion, reported in 8 *C. E. Green* 496.

For affirmance—BEASLEY, C. J., BEDLE, CLEMENT, GREEN, LATHROP, LILLY, VAN SYCKEL, WALES, WOODHULL. 9.

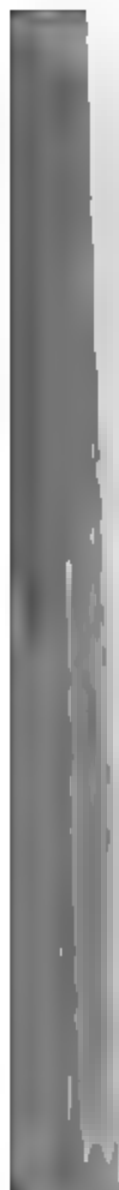
For reversal—DALRIMPLE, SCUDDER. 2.

BOWLBY, appellant, and BOWLBY, respondent.

Decree unanimously affirmed upon the grounds stated by the Vice-Chancellor in his opinion, (*ante p.* 406.)

ADDITIONAL RULE
OF
THE COURT OF CHANCERY.

189. When a cause, referred to the Vice-Chancellor, shall be at issue, either party may, upon five days' notice to the other party or parties, apply to the Vice-Chancellor to fix a time and place for the hearing thereof; and, upon such application, the Vice-Chancellor may designate such time and place, the time not to be less than thirty days thereafter; and upon twenty days' notice in writing of the time and place so designated, given by either party to the other or others, the cause may be heard.



INDEX.

ACCOUNT.

See DOWER, 2, 3.
PARTITION, 1.
PLEADING, 6.

ACQUIESCENCE.

No relief can be had on the ground of acquiescence, against an infant.
Haggerty v. McCanna, 48

See DIVORCE, 2.
INJUNCTION, 9.
MUNICIPAL CORPORATION, 1.

ADJOURNMENT.

See SALE OF LAND, 1.

ADMINISTRATOR.

See PLEADING, 11.
SPECIFIC PERFORMANCE, 6, 8.

AFFIDAVIT.

See PRACTICE, 14.

AGENT.

See CREDITOR AND DEBTOR, 3, 4.
PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.
HUSBAND AND WIFE, 7.
PARENT AND CHILD, 2.
RAILROAD COMPANY, 7.
SHERIFF'S SALE, 3.
USURY, 4.

ALIMONY.

1. In fixing a yearly sum for alimony, after final decree for divorce from bed and board, the large and valuable real estate of the husband ought not to be regarded as an ordinary farm, in judging of his faculties. The defendant should be called on to change the character of the property in which his wealth is invested, if such change is requisite to make suitable provision for his wife, driven by his extreme cruelty from his house. *Close v. Close*, 434

2. Under the statute of this state, alimony cannot be given in a gross sum, nor in a portion of the real estate of the husband. *Culame v. Culame*, 548

AMENDMENT.

See DECREE, 6.
PRACTICE, 13, 14, 18, 21, 22, 24.

ANSWER.

1. An answer must answer fully all the material allegations and charges in the bill, and all the interrogatories founded upon and incidental to them. This rule is strictly adhered to in cases of fraud. *Freeland v. N. J. Stone Co.*, 140

2. The insufficiency of the answer in important particulars, is sufficient ground for refusing to dissolve an injunction, granted upon filing the bill. *Ib.*

See PLEADING, 4, 5, 7, 8, 13.
PRACTICE, 22.
USURY, 7, 10, 12.

APPEAL.

1. A party having no interest or claim under the intestate, in lands ordered to be sold for the payment of his debts, but setting up a claim thereto by title paramount, is not entitled to appeal from the order of sale. *Swackhamer v. Kline's Adm'r*, 503
2. He only, who is aggrieved by such order, has the right to appeal, and a party aggrieved is one whose pecuniary interest is directly affected by the decree, or whose right of property may be established or divested thereby. *Ib.*
3. A stranger to partition proceedings before the Orphans Court, having no right that will be affected by a partition, and claiming the land by title paramount to that of the parties to such proceedings, has no right of appeal from an order appointing commissioners to make partition. He is not a person aggrieved by such order, within the meaning of the constitutional provision for appeal. *Raleigh v. Rogers*, 506
4. An order refusing to allow an answer to be amended does not so enter into a subsequent interlocutory decree deciding the merits, that it can be reviewed on an appeal from such interlocutory decree. *Butterfield v. Savings Bank*, 533
5. It is a matter for consideration, how far exceptions, taken on a *voir dire* hearing before the Vice-Chancellor, should be specified in the petition of appeal. *Ib.*

ASSESSMENT.

See JURISDICTION, 4, 7, 8.
MUNICIPAL CORPORATION.

ASSIGNEE.

See MORTGAGE, 15, 16, 17.

ASSISTANCE, WRIT OF.

The writ of assistance refused, because the sale under the execution was not sufficiently advertised as to one of the tracts sold. The writ is discretionary, and will be granted only in clear cases. *Vanmeter v. Borden*, 414

ATTACHMENT.

See CREDITOR AND DEBTOR, 1, 2.

BILL.

See CREDITOR AND DEBTOR, 1, 2.
PLEADING, 9.

BONA FIDE PURCHASER.

1. Under the statute of frauds of this state, a *bona fide* purchaser acquiring either a legal or equitable title to lands from a grantee, to whom the title has been fraudulently conveyed, will be protected against a judgment subsequently obtained against the fraudulent grantor. *Phelps v. Morrison*, 538
2. In this case lands were conveyed by a husband, mediately to his wife, in fraud of his creditors. The wife, having the title, agreed to sell the lands to, and received the consideration from a *bona fide* purchaser, but did not make a valid title; a creditor then obtained a judgment against the husband and levied on the lands. *Held*, that the equitable title of the purchaser would be preferred and enforced in equity. *Ib.*
3. The statute of frauds, in this respect, discussed and construed. *Ib.*

BONDHOLDERS.

See PARTIES, 1.

BURDEN OF PROOF.

See MORTGAGE, 14.

CESTUI QUE TRUST.

See MORTGAGE, 5, 16.
PARTIES, 2.
PRACTICE, 23, 24.

COLLATERAL SECURITY.

See DECREE, 3.
INJUNCTION, 1.

COMPENSATION.

See CONTRACT, 7, 8.
PARENT AND CHILD, 1, 3.
RAILROAD COMPANY, 3, 4, 8-11.

CONTEMPT.

See INJUNCTION, 3-5.

CONTRACT.

1. In every contract for the sale of lands, an agreement is implied to make good title, unless that liability is expressly excluded. The estate which the purchaser bargained for, whether in fee simple, or for a lesser interest, will be ascertained from the terms of the agreement, or if the agreement be silent in that respect, from the circumstances attending the transaction. For such estate, whatever it may be, the purchaser has a right to a good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give. *Lounsbury v. Locander*, 554.
2. The vendor will not, either at law or equity, be deemed to have complied with his contract by tendering a conveyance in legal form with such covenants (if any) as were stipulated for in the agreement, if, in fact, he has not the title which he contracted to sell. *Ib.*
3. As a general rule, an agreement to convey, means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate. *Ib.*
4. A stipulation that a party shall have the privilege of purchasing, is equivalent to an agreement to convey, and will entitle him to a conveyance at least, of all the estate the other party had at the time of the contract. *Ib.*
5. The legal effect of an agreement made by a grantee with the grantor, executed after the conveyance, but which was, in fact, part of the original arrangement under which the conveyance was made, that the grantor should have the refusal of a specified part of the premises conveyed, at the same rate per acre that he received for the whole, in a suit to enforce such agreement by the grantor, is that of a contract to reconvey the same title to the premises as the grantee acquired under his deed, free from any charges or encumbrances to which the same may have been subjected by such grantee whilst he was owner. *Ib.*
6. Under a contract to convey, equity will not compel the vendor to enter into any covenants for title, where no defect in the title is disclosed, in the absence of any stipulation that the purchaser shall have a conveyance with such covenants. *Ib.*
7. The general doctrine in equity is, that a purchaser, on a bill for specific performance filed by the vendor, will not be compelled to accept compensation or indemnity; and that on a bill by the purchaser, a vendor will be required to allow compensation, in case he is able to make title for a part, but not for the whole, if the purchaser consents to accept part performance with such compensation. *Ib.*
8. But a court of equity will not compel the vendor to give indemnity except under extraordinary circumstances, or decree a covenant of indemnity against him, unless the parties have contracted for it. *Ib.*

See MARRIED WOMAN.
SPECIFIC PERFORMANCE, *passim*.

COSTS.

See MORTGAGE, 13.
WILL, 12.

COVENANT.

See CONTRACT, 2, 6, 8.

CREDITOR AND DEBTOR.

1. A creditor, admitted as such by rule under an attachment, has a lien on the property attached, which entitles him to maintain a bill to remove the encumbrance of a conveyance, made with intent to defraud the creditors. *Curry v. Glass*, 108
2. It is not necessary in such a case that the consideration of the debt should be stated in the bill. The claim of the creditor, verified by affidavit, as required by the statute, (which appears in the bill,) is a subsisting debt for the purpose of creating the lien. *Ib.*
3. Creditor's bill to set aside a conveyance by the debtor, on the ground that the conveyance was made without consideration, and to defeat creditors. Decree accordingly. *Hecht v. Koegel*, 135
4. It is well settled that a debtor is authorized to infer that an attorney or agent, who has been employed to make a loan, is empowered to receive both principal and interest, from his having possession of the bond and mortgage given for the loan, or of the bond only. But the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent on the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made. *Haines v. Pohlmann*, 179

of a bond, allowed the debtor, the action of the creditor estopping him from denying the agency, and relieving the debtor from seeing to it that the agent had possession of the securities when the payments were made. *Ib.*

6. Services rendered by a wife in the course of the discharge of her duty as a wife, do not, nor does the money she brings to her husband at their marriage, constitute a valid consideration for a conveyance of lands to her as against the husband's creditors. *Carpenter v. Carpenter*, 194
7. A conveyance made by a debtor, with a view to his future indebtedness, and to protect his property against it, is void as to creditors. *Ib.*
8. Lands which were conveyed by a husband to his wife about the time when he contracted debts for which a judgment was afterwards recovered against him—*held*, to be subject to the judgment, on the ground that the conveyance to the wife was in fraud of creditors. *Clarke v. McGeihan*, 423

See BONA FIDE PURCHASER.
HUSBAND AND WIFE, 1-3.
JUDGMENT, 2.
PARENT AND CHILD, 2.
SUBROGATION.

CROSS-BILL.

See PRACTICE, 9, 10.

CURTESY.

See JUDGMENT, 2.
TENANT BY CURTESY.

DECLARATION OF TRUST.

See TRUST AND TRUSTEE, 5.

DECREE.

5. Payments made to an agent on account of principal and interest.
1. A personal decree for deficiency of proceeds to pay the mortgage debt,

does not become a lien upon the real property of the person against whom it is taken, until after the sale and in case a deficiency is found to exist. *Bell v. Gilmore*, 104

2. Final decree set aside and defendants let in to answer, on proof of surprise. *Vandeventer v. Stiger*, 224

3. A complainant who holds a bond and mortgage given to him by the mortgagor, as collateral security merely, for a debt alleged to be due him by the mortgagor, should, in proceedings for the foreclosure of the mortgage, prove his debt, and if it be less than the amount due on the mortgage, take a final decree for the amount of his debt and interest only. *Ib.*

4. In a suit for divorce on the ground of desertion, a decree will not be granted when the only evidence of the alleged desertion is the oath of the witnesses, that the defendant "deserted" the complainant. *Leaning v. Leaning*, 241

5. A variance in the probata of time, place, and person, from the allegations, is fatal to a decree for divorce on the ground of adultery. *Prince v. Prince*, 310

6. Decree and execution for sale of mortgaged premises amended by reducing the amount decreed to be due. *Insurance Co. v. Brittan*, 331

7. A personal decree for deficiency of proceeds of sale has not the force and effect of a judgment at law, until the excess of the mortgage debt over the proceeds of sale has been ascertained. Hence a mortgage given by a party against whom such decree was taken, upon other lands, registered after the decree was made, but before the sale under it, is a lien on those lands prior to the decree. *Mutual Life Insurance Co. v. Southard*, 337

8. Decree *pro confesso* opened, with leave to answer, on the ground of surprise; no negligence being

attributable to the defendants. *Miller v. Wright*, 340

DECREE FOR DEFICIENCY.

See DECREE, 1, 7.

DEED.

1. In the absence of proof as to the time of delivery of a deed, the presumption is that it was delivered on the day of its date. *Huber v. Diebold*, 170

2. A deed of conveyance of lands having been delivered to the complainant by the defendant, and afterwards, before it was recorded, having been entrusted to the defendant for the purpose of having certain informalities in the deed corrected, the defendant refused to return it—*held*, that he should be decreed to execute the trust reposed in him, by restoring the deed, or, if destroyed by him, to give another good and sufficient conveyance for the premises. *Albert v. Burbank*, 404

3. Equity will relieve against a conveyance made without consideration, and when the grantor, through intoxication, was, to the grantee's knowledge, not himself. But, under the circumstances, complainant not entitled to costs. *Warnock v. Campbell*, 485

4. Taxes paid by the grantee, with interest from time of payment, must be repaid to him. *Ib.*

See MORTGAGE, 12.

SPECIFIC PERFORMANCE, 1, 2.
TAX WARRANT, 2.

DEMURRER.

See PLEADING, 10.
PRACTICE, 19, 20.

DESERTION.

See DIVORCE, 3, 6, 7, 9.

DEVISE AND DEVISEE.

See GRANT, 1.
JUDGMENT, 3.
PARTITION, 3.

DIVORCE.

1. A party to a collusive divorce is bound by it, and can not, in another suit for divorce, brought in this state, take advantage of the fraud and illegality of the proceedings upon which such decree was based. *Nichols v. Nichols*, 60
2. When a decree of divorce has been acquiesced in for several years, and the plaintiff has again been married, the court will not disturb the decree for the purpose of giving alimony. Such intervention should be based on public policy, but no such reason should suffice when, after the acquiescence of both parties in the decree for four years, an innocent person has been involved by marriage, and the opening of the decree would involve her in distress, and perhaps disgrace. *Ib.*
3. In a suit for divorce, on the ground of desertion, the facts and circumstances under which the desertion took place, and the reasons which caused or provoked it, if the same can be ascertained, should be reported by the master. A decree in such a case will not be granted where the only evidence of the alleged desertion is the oath of the witnesses, that the defendant "deserted" the complainant. *Leaning v. Leaning*, 241
3. It is the duty of a wife who sues for a divorce, to cease cohabitation with her husband until the termination of the suit. *Chapman v. Chapman*, 394
5. Where a wife files her bill for divorce on the ground of adultery, the husband will not, because the wife claims to be the owner of the house in which they dwell, be compelled to leave it until it shall be determined by the result of the litigation whether the charges against him are well founded or not. *Ib.*
6. A separation from her husband by the wife for more than three years, though begun by her without such reasons as would have sufficed on her part to procure a divorce from him, *held* not to entitle him to a divorce, because of his neglect to do anything to induce her to return. *Bowlby v. Bowlby*, 406
7. The desertion, though willfully begun, *held* not to have been obstinately continued, but to have been in fact made compulsory against her by the conduct of her husband. *Ib.*
8. An acknowledgment of service of a copy of the citation in a divorce suit is not evidence of a legal service, to give the court jurisdiction where the defendant does not appear. There should be evidence of the service of a copy of the petition also. *Stone v. Stone*, 445
9. In a suit for divorce for desertion, desertion must appear from the facts sworn to. *Ib.*
10. Where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or health of the wife, or where he has inflicted upon her any physical injury accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced. *Close v. Close*, 526
11. No rigid rule can be presented to define the extent of the injury, actual or apprehended, which will justify judicial interference. *Ib.*
12. *Quere*: Whether relief will be granted in a case of extreme hardship, in the absence of any actual or apprehended physical injury? *Ib.*

DOWER.

1. The Court of Chancery has power to set aside an excessive assignment of dower. It has undoubted jurisdiction over the whole subject, and is competent to administer the appropriate relief on equitable terms. *Pierson v. Hitchner*, 130

2. Where a widow had married again, and her husband had made improvements on that part of the lands assigned to the widow, at the request of the parties seeking to set the assignment aside, it was held that he was entitled to compensation therefor, and that he and his wife must account, as trustees, to the heirs, for the reasonable annual value during the time they had enjoyed it, of any excess which may appear of the dower as assigned, beyond the proper quantity which may be ascertained upon readmeasurement. *Ib.*

3. A widow, whose dower has not been assigned, cannot be required to account for the rent of the mansion-house, although she has rented it and received rent for it. Her tenant's possession is hers. *Craige v. Morris*, 467

4. In ascertaining the proper sum to be paid in gross to a tenant in dower or by the curtesy, in commutation of such interest, the 130th and 131st rules of the Court of Chancery on the subject, should not be taken as an absolute guide; but, irrespective of the result of the application of the rule to the case in hand, the court should determine what, in that case, under the circumstances thereof, is a reasonable sum to be paid in commutation. *Cronkright v. Haulenbeck*, 513

See PRACTICE, 7, 8.

SPECIFIC PERFORMANCE, 1.

EASEMENT.

The purchaser of land subject to a continuous and apparent easement, takes it subject to the burthen of that easement, and will be restrain-

ed from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time such purchaser bought. *DeLuze v. Bradbury*, 70

EQUITABLE CONVERSION.

A contract for the sale of real estate works an equitable conversion of the land into personalty from the time when it was made, and the purchase money becomes, thereupon, a part of the vendor's personal estate, and, as such, distributable, upon his death, to his widow and next of kin. *Miller's Adm'r v. Miller*, 354

EQUITABLE LIEN.

Money paid by one in satisfaction of a mortgage upon land which he supposed was his wife's, declared an equitable lien on the land. *Haggerty v. McCanna*, 48

See MORTGAGE, 9, 10.

EQUITABLE OFFSET.

To maintain an equitable offset, the party seeking the benefit of it must show some equitable ground for being protected against his adversary's demand. The mere existence of a counter demand is not enough, nor will the mere pendency of an account, out of which a cross demand may arise, confer the right to an equitable offset. *Heritt v. Kuhl*, 24

See INJUNCTION, 2.

ESTOPPEL.

Knowledge that a judgment was outstanding upon lands upon which the owner, supposing them to be free from encumbrance, was erecting a building in the sight of the person having such knowledge, and

silence on his part while the building was thus being erected, will not estop him from enforcing execution upon that judgment in which he purchased an interest after the building was sufficiently advanced to secure the amount due thereon. Silence would not operate as an estoppel until he obtained an interest in the judgment. *Dillett v. Kemble*, 66

See CREDITOR AND DEBTOR, 5.
HUSBAND AND WIFE, 3.

EVIDENCE.

1. In construing a declaration of trust "I hereby cancel the above bond and give it voluntarily to Mrs. I. C., and her heirs," verbal declarations of the donor made prior to and contemporaneously with the gift, and relating to it, are competent evidence as to whom she meant to designate by the words "her heirs." *Eaton v. Cook*, 55
2. The sheriff's return "served" upon the subpoena, is presumptive proof of the service of the notice required by the 38th rule. *Bell v. Gilmore*, 104
3. It is not incumbent on a foreign corporation, complainant, to prove their corporate existence when the answer raises no question as to their existence, or right to sue, but sets up a defence on the merits alone. *The Washington Life Insurance Co. v. Puterson Silk Co.*, 160
4. The unsupported testimony of a defendant seeking to avoid a mortgage debt on the ground of usury, that the broker, to whom he applied for the loan which the mortgage was given to secure, told him that he was the agent of the mortgagee, to make loans, cannot affect the mortgagee. *Ib.*
5. In the absence of proof as to the time of delivery of a deed, the presumption is, that it was delivered on the day of its date. *Huber v. Diebold*, 170
6. Though strict proof of the defence

of usury is required, the weight of evidence will not be disregarded under that defence. *Warwick v. Marlatt*, 188

7. A statement made by a testator estimating the amount of his estate with reference to his will and the disposition therein made, is inadmissible to show at what rate interest should be charged against the estate upon a legacy given by the will. *Fowler v. Colt*, 202

See DECREE, 5.
DIVORCE, 8.
HUSBAND AND WIFE, 5.
MECHANICS' LIEN, 10.
USURY, 1, 2, 7, 9.
WILL, 11, 20.

EXCEPTIONS.

See APPEAL, 5.

EXECUTION.

See MORTGAGE, 4.

EXECUTOR.

1. When it is the duty of executors to separate a legacy from the estate, within a reasonable time, and to invest it with a view to accumulation and the necessities of the support and education of the legatee, their neglect of such a duty makes them chargeable with interest at the legal rate, for the time being. The omission of executors to invest a legacy, as intended by the testator, will not be excused by the fact that it was for the interest of the residuary legatees that the legacy should not be separated from the estate as long as it could be avoided. *Fowler v. Colt*, 202
2. Where there is a bequest of the income of a sum of money to one for life, and then the principal to another, without any trustee being named in the will other than the executor, he will be held to be trustee. *Parker's Executors v. Moore*, 228

See PLEADING, 3.

FIXTURES.

1. The rule against the right to sever and remove fixtures, is stronger as between mortgagee and mortgagor than as between landlord and tenant. *Rogers v. Brokaw*, 496
2. Two machines, mainly of iron, one weighing thirty-six hundred pounds and the other two tons, placed directly on the floor of a factory, with no other support, and driven by connections with secondary shafting, which was connected by bands with the main shafting driven by a steam engine, changeable in their position as convenience might require, and that could be taken in and out of the factory without difficulty and in little time—*held*, between mortgagee and mortgagor, not to be fixtures, and that no title thereto passed by a sale under foreclosure of a mortgage on the land made prior to a chattel mortgage on the machines. *Ib.*
3. The intention to make a thing annexed to or placed upon the freehold, personal property, does not alter its legal character of fixture, if it be such. Whether fixture or not, depends on facts, and not on the opinion of the person making the annexation; and in this view, evidence is inadmissible to show his intention. *Ib.*
4. But the intention as to making a permanent or temporary annexation to the freehold, is a competent and material subject of proof. *Ib.*
5. Movable machines, whose number and permanency are contingent on the varying circumstances of business, subject to its fluctuating conditions and liable to be taken in or out, as exigencies may require, are different in nature and legal character from steam engines, boilers and other articles secured by masonry or other substantial annexation, designed to be permanent, and indispensable to the enjoyment of the freehold. *Ib.*

FEDERAL COURT.

See JURISDICTION, 5, 6.

FORFEITURE.

See MORTGAGE, 3.
WILL, 23.

FRAUD.

See ANSWER, 1.
PLEADING, 1, 10.
SHERIFF'S SALE, 3.

FRAUDS, STATUTE OF.

See BONA FIDE PURCHASER.

FRAUDULENT CONVEYANCE.

See CREDITOR AND DEBTOR, 1, 3, 6-8.

GRANT.

1. Where a general grant is made of two acres of land adjoining or surrounding a house, part of a larger quantity, the choice of the two acres is in the grantee, and a devise is to be considered as a grant. *Lore v. Stiles*, 381
2. The grantee of such devisee has the right of selection, if not made before the conveyance to him. *Ib.*
3. If the selection cuts off the owners of the rest of land from access thereto, a way of necessity exists in their favor over the land selected. *Ib.*
4. Where the words of the grant are clear and unequivocal, there is no room for the application of the principle that the grant must be construed most strongly against the grantor. *Johnson v. Jaqui*, 410
5. The conveyance in this case gave the right to take the water from an upper to a lower pond—*held*, that no right could be inferred to take the water from the upper pond to

a wheel below the lower pond. The parties must be confined to the plainly expressed agreement in the deed. *Ib.*

GUARDIAN AND WARD.

A guardian will not be allowed the cost or even the value of buildings erected on the estate of the ward, without authority. *Haggerty v. McCanna*, 48

GRANTEE AND GRANTOR.

See DEED, 2-4.
GRANT.

HEIR-AT-LAW.

See SPECIFIC PERFORMANCE, 8.
WILL, 23.

HIGHWAY.

See TOWNSHIP AUTHORITIES, 1.

HUSBAND AND WIFE.

1. The avails of a wife's labor in her husband's business belong to him, and property purchased therewith, in the name of the wife, cannot be held by her against her husband's creditors. *Clinton Station Manufacturing Co. v. Hummell*, 45
2. Services rendered by a wife in the course of the discharge of her duty as a wife, do not, nor does the money she brings to her husband at their marriage, constitute a valid consideration for a conveyance of lands to her against her husband's creditors. *Carpenter v. Carpenter*, 194
3. Representations made by a debtor, in the presence of his wife, of the value of his property, which, at the time and for several years, had been in the wife's name, by voluntary conveyance from him, by which representations another is

induced to suppose he is the owner of the property, and to bind himself for the payment of money which he was subsequently obliged to pay, estops the wife from setting up such title as against such creditor's demand. *Ib.*

4. The fact that part of the purchase money of land bought by and conveyed to a husband, was the earnings of the wife during coverture, gives her no claim against him, or against the proceeds of sale of the property. *Persons v. Persons*, 250
5. Whether a purchase in the name of a wife is a settlement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement; but any antecedent or cotemporaneous acts or facts may be received either to rebut or support the presumption. *Ib.*
6. Where a wife takes title to real estate in her own name, but purchases it with the money, and as the agent of her husband, in the absence of any proof of the settlement of the property upon her, there is a resulting trust in the husband's favor. *Ib.*
7. An agreement in writing, made by a husband who had deserted his wife, to give her certain land and money, in lieu of all her claim upon him for maintenance, the offer having been accepted by the wife, will, on a divorce being granted, be enforced in equity. *Calame v. Calame*, 548

See CREDITOR AND DEBTOR, 6, 8.
MORTGAGE, 15.
PRACTICE, 17, 18.
SPECIFIC PERFORMANCE, 1.

IMPLIED PROMISE.

See PARENT AND CHILD, 3.

INDEMNITY.

See CONTRACT, 7, 8.
SPECIFIC PERFORMANCE, 1.

INFANT.

See PRACTICE, 8.

INJUNCTION.

1. That a plaintiff in a suit at law to recover moneys due upon certain notes and checks, has assigned for full value a mortgage given to him by the defendant in that suit, and intended as collateral security merely, furnishes no ground for injunction to restrain the prosecution of the suit. The assignment would be a payment *pro tanto*, of which such defendant might avail himself in the suit at law. *Hewitt v. Kuhl*, 24
2. In a suit seeking an equitable offset upon an account between former partners and an injunction to restrain a suit at law by the defendant against the complainant upon notes given in course of partnership transactions, the mere assertion of a counter demand will not hold the injunction issued upon filing the bill. Some account must be given, or statement made, or facts alleged, from which the court can judge whether the complainant would probably be able to establish his claim. *Ib.*
3. Where the conduct of a party sought to be attached for a violation of an injunction, is, literally, a breach of the injunction, but not so in spirit, and it clearly appears that there was not only no intention to disregard the injunction, but a supposition that his action would receive the approbation of the court, he will not be adjudged guilty of contempt. *Fraas v. Barlement*, 84
4. A party enjoined, violates the plain and positive mandate of the court at his peril. Advice of counsel, that he may safely pursue the course prohibited, without conforming to limitations prescribed by the injunction, will not avail to excuse his misconduct. *McKillopp v. Taylor*, 139
5. That the injury complained of was done before the service of the injunction upon the defendant, and that his acts since the service of the injunction have done the complainant no further injury, will not, when those acts were intended to make the injury complete, and the obvious intention of the interdict was to prohibit him from continuing the injury, relieve the defendant from the effects of his violation of the injunction. *Thropp v. Field*, 166
6. An injunction, issued to restrain municipal authorities from proceeding under their charter to remove a building alleged to encroach upon the line of a street, will not be dissolved upon the hearing on bill and answer, where such building was erected under a claim of right, on a line on which for a period of thirteen years numerous houses had been built, where no public inconvenience will be occasioned by continuing the injunction, and where the private interests involved are considerable, and the questions raised affect not only the complainant but others, who have erected buildings in like position and under like circumstances. *Manko v. Borough of Chambersburg*, 168
7. It is the established rule of this court, that an injunction will not be dissolved for new matter in avoidance alleged in the answer, not responsive to the bill. *Vreeland v. N. J. Stone Co.*, 140. *Johnston v. Corey*, 311
8. When the defendant in an injunction bill to restrain his proceeding to collect a judgment recovered against the complainants, has not answered a charge of insolvency, and a dissolution of the injunction might leave the complainants remediless in the premises, and compel them to bear burdens from which, in equity, they should be relieved, the injunction will be retained until the hearing. *Ib.*
9. The defendant, under and in the assertion of a claim of right, threat-

ened to enter upon the complainant's premises, of which the latter was in possession, and himself to secure a right, of which he alleged he had been deprived, and, in so doing, would inflict irreparable injury on the complainant, who denied his right, and there was evidence in the defendant's answer, from which acquiescence, on the part of the defendant, might be deduced. The court restrained the defendant, by preliminary injunction, from doing the threatened injury. *Johnston v. Hyde*, 454

10. Interlocutory mandatory injunction to compel defendant, who was under covenant to repair, to repair a building, refused; it not appearing that the building was in danger from the alleged non-repair, and there being a dispute as to the liability, and it appearing that the lessor, who was complainant, had liberty to make the repairs himself, and had an adequate remedy at law. *Jarris v. Henwood*, 460

See ANSWER, 2.

MUNICIPAL CORPORATION, 1, 2, 9, 11.

RAILROAD COMPANY, 8, 12.

TOWNSHIP AUTHORITIES, 1.

INTEREST.

See LEGACY, 3, 4, 5.

INTERPLEADER.

See PLEADING, 2.

TRUST AND TRUSTEE, 6.

ISSUE.

See PLEADING, 13.

JUDGMENT.

1. The judgment of a court of general jurisdiction in any state of the Union, is equally conclusive upon the parties in all other states as in the state in which it was rendered;

subject to qualifications. *Nichols v. Nichols*, 60

2. A judgment recovered against a debtor, whose wife, to whom he was married before the passage of the married woman's act of 1852, was possessed of separate real estate before the passage of that act, is a lien upon his life estate therein. *Dayton v. Dusenbury*, 110
3. A judgment recovered against a devisee for life vested under the will with power to consent that the executors should sell the real estate at their discretion, and appropriate the income for the support of such devisee and his family during the devisee's life, does not work an extinguishment of the power. The lien of the judgment is subject to the power. *Leggett v. Doremus*, 122

See BONA FIDE PURCHASER, 1, 2.
CREDITOR AND DEBTOR, 8.
ESTOPPEL.
MORTGAGE, 8.
PRACTICE, 5.
VENDOR AND PURCHASER.

JURISDICTION.

1. A creditor, admitted as such by rule under attachment, has a lien on the property attached, which entitles him to maintain a bill to remove the encumbrance of a conveyance, made with intent to defraud creditors. *Curry v. Glass*, 108
2. The Court of Chancery has undoubted jurisdiction over the whole subject of dower, and is competent to administer the appropriate relief on equitable terms. *Pierson v. Hitchner*, 130
3. Though in general the Court of Chancery will not entertain a bill for specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law; yet, notwithstanding this general distinction between personal contracts for goods, and contracts for lands, in some cases equity will enforce contracts

for personal property. *Cutting v. Dana*, 265

4. A party aggrieved by an illegal assessment has his remedy at law, and when that is adequate and ample, equity will not interfere. *Lewis v. City of Elizabeth*, 298

5. When the jurisdiction of a state court has once attached to a suit, no subsequent change in the condition or residence of a party can oust it, without express provision to that effect. Hence, the court refused an application to remove into a Federal court a suit brought by a citizen of this and a citizen of another state, against defendants, some of whom were citizens of this, and some, citizens of another state, made on the ground of the death of the non-resident complainant. *Upton & Williamson v. N. J. So. R. R. Co.*, 372

6. The fact that a bill prays an injunction, will not, without reference to the object and purpose of the bill, be regarded as of itself sufficient to bring the suit within the meaning of the words of the act of Congress of July 27th, 1866: "a suit brought, instituted, and prosecuted for the purpose of restraining or enjoining the defendant," and to afford a ground of removal into a Federal court, under that act. *Ib.*

7. As a general rule, equity will not interfere to restrain the collection of a tax, which is illegal or void, merely because of its illegality, but there must be some special circumstances attending the injury threatened, to bring the case within some recognized head of equity jurisdiction. *Bogert v. City of Elizabeth*, 426

8. The jurisdiction to declare such illegal or unconstitutional character, and to annul the title sought to be derived from the sales, belongs to the courts of law, and when recourse to those courts is omitted to be had, either through the neglect or choice of the party aggrieved, there exists no equita-

ble element on which this court can give relief. *Ib.*

See ORPHANS COURT.

LACHES.

See MUNICIPAL CORPORATION, 1, 7.
SPECIFIC PERFORMANCE, 8.

LAND CHARGED WITH PAYMENT OF LEGACIES.

See LEGACY, 1, 2.

LANDS LIMITED OVER OR IN CONTINGENCY.

1. Lands devised to R. and C. during their natural lives, and after their decease to their children, with proviso that if either of them should die without issue, the survivor should have the entire property during her life, and at her death it should descend to her children, directed to be sold under the "act to authorize the sale of lands limited over to infants, or in contingency, in case where such sale would be beneficial." *In the matter of Rebecca Mickle*, 53

2. Under peculiar circumstances, the amount of certain encumbrances which were upon lands sold under the "act to authorize the sale of lands limited over to infants, or in contingency, in cases where such sale would be beneficial," and clear of which they were sold by the master, allowed out of the proceeds of sale. *Cool's Executors v. Higgins*, 117

LEGACY.

1. Land charged with the payment of legacies and interest thereon, when the testator clearly intended that the charge should be a continuing and subsisting security for the payment thereof, cannot be relieved from such charge by the payment by the devisee of the full amount of the legacies, to the executors. *Grode v. Van Valen*, 95

2. The lien of a legacy charged on land, cannot be divested, except by an actual payment or release, or by a decree in a suit in which each legatee, or his personal representative, is a party. *Ib.*

3. A statement made by a testator, estimating the amount of his estate with reference to his will and the disposition of it therein made, is inadmissible to show at what rate interest should be charged against the estate upon a legacy given by the will. *Fowler v. Colt*, 202

4. Where it is the duty of executors to separate a legacy from the estate within a reasonable time and to invest it with a view to accumulation and the necessities of the support and education of the legatee, their neglect of such duty makes them chargeable with interest at the legal rate, for the time being. *Ib.*

5. Where testator's whole estate was vested at his death in a certain stock, of which he held the whole, in ascertaining the interest due upon a pecuniary legacy given by the will, the amount of which legacy has not been separated, as it should have been, from the estate, the dividends which have been, during all the time for which interest is to be ascertained, irregular and desultory, not based on the earnings of the company, and are no evidence of the income from the shares, are no guide as to the rate of interest to be charged, but interest should, in such case, be calculated at the legal rate, from time to time, during the period required. *Ib.*

6. The omission of executors to invest a legacy as intended by the testator, will not be excused by the fact that it was for the interest of the residuary legatees, that the legacy should not be separated from the estate so long as it could be avoided. *Ib.*

7. A bequest of a sum of money generally, without distinguishing it

from testator's other moneys, or mentioning out of what fund it is paid, is a general legacy. A designation of such bequest in the residuary clause as a "specific" legacy will not change its character as general, when the term is evidently used by the testator with reference to the fact that it was a legacy of a principal sum of money. *Parker's Executors v. Moore*, 228

See EXECUTOR, 1.
WILL, *passim*.

LICENSE.

See RAILROAD COMPANY, 7.

LIEN.

See CREDITOR AND DEBTOR, 1, 2.
DECREE, 1.
JUDGMENT, 2, 3.
LEGACY, 1, 2.
MORTGAGE, 7.

LIEN, PRIORITY OF.

See DECREE, 7.
MECHANICS' LIEN.
MORTGAGE, 6.

LIFE ESTATE.

See JUDGMENT, 2.

MAINTENANCE.

See HUSBAND AND WIFE, 7.

MARRIED WOMAN.

1. A contract entered into by a married woman for the sale of her estate will not be enforced. *Pierson v. Lum*, 390
2. But equity will charge such estate with the value of property delivered to her as the consideration of the contract, and with moneys expended by the vendee in the erec-

tion of a house on the land, and in otherwise improving it, with her knowledge and consent. *Ib.*

See SPECIFIC PERFORMANCE, 1.

MASTER'S REPORT.

See DIVORCE, 3.
STOCK.

MECHANICS' LIEN.

1. E. D. L. & Co., carpenters, contracted on the 28th of March, 1872, with the mortgagor, to do the carpenter work for a house to be erected on the mortgaged premises. Complainant's mortgage was recorded on the 4th of April following. Operations for building the house were not commenced on the ground until after the mortgage had been recorded. E. D. L. & Co. claimed a lien for the amount due them for their work under their contract, and that it was prior to that of the mortgage, on the ground that they had commenced the building before the recording of the mortgage. The evidence was, that the only work they had done before the recording of the mortgage, was "marking on the rods the length and width of the window-frames," but the window-frames were not made until the 8th of April, four days after the recording of the mortgage. *Held*, that the mortgage was entitled to priority over the lien. *Taylor v. La Bar*, 222
2. A mortgage recorded before the commencement of a building, and given to secure advances to be made to pay for the construction of the building, for the payment of which advances in installments, the mortgagee bound himself by written agreement when the mortgage was given, is entitled to priority over a lien claimed under the mechanics' lien law, for work done in the construction of the building. *Ib.*
3. A purchase money mortgage has preference over lien claims for work done and materials furnished in buildings and improvements put upon the mortgaged premises by the purchaser, between the execution of the contract of purchase and the conveyance, not only to the extent of the purchase money, but also for all advances made in accordance with the contract of purchase, for building the houses, improving the grounds, and paying taxes and municipal assessments. It does not affect the priority of the lien of the mortgage, that the property had been conveyed to another before the conveyance to such purchaser, and that the money was advanced by a third person. *Macintosh v. Thurston*, 242
4. The mortgage and deed being delivered simultaneously, the seizure of the purchaser was a merely transitory one, to which no lien could attach. *Ib.*
5. An agreement by the vendor, under contract of purchase, to furnish the vendee funds for the erection of buildings upon the premises, is not the consent intended by the fourth section of the mechanics' lien law. *Ib.*
6. But if it was such consent, and such consent need not be recorded, the lien in such case must be subject to all liens incurred by the purchaser, which by the contract were to be discharged of record before conveyance. *Ib.*
7. A lien will not attach to premises when the owner is not made party to the suit. *Ib.*
8. The title of a purchaser at a sheriff's sale under an execution, issued upon a judgment recovered under a mechanics' lien, general as against the owner, and special as against the lands, is paramount to all encumbrances put upon the property after the commencement of the building. *Tompkins v. Horton*, 284
9. A mortgagee is not an "owner" within the meaning of the mechanics' lien law, and is not entitled to notice of a suit upon a lien claim.

The owner of the legal estate is alone to be made a party. *Ib.*

10. In examining a lien claim alleged to be a cloud upon title, the court will not admit extrinsic evidence in aid of the claim, but will examine the record evidence only. *Raymond v. Post*, 447

11. Where a lien claim was filed after the commencement of a suit in this court to foreclose a mortgage which was on the land before the work was done or materials provided for which the lien was claimed, and the lien claimants were not made parties to the suit, and did not apply to be made parties, the claim was held to be cut off by virtue of the provisions of the "act relating to the Court of Chancery," (*Pamph. L.*, 1870, p. 40,) by sale under foreclosure. *Ib.*

12. The act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," (*Pamph. L.*, 1870, p. 20,) applies to a lien claim. *Ib.*

MERGER.

It does not necessarily follow that, by a mortgagee becoming the purchaser of the premises, and taking title therefor at the sale under the foreclosure, his mortgage is merged or extinguished in his legal title. *Parker v. Child*, 41

MISJOINDER.

See PRACTICE, 19.

MISTAKE.

Equity will not relieve against the consequences of a mistake, which is the result of inexcusable negligence. *Haggerty v. McCanna*, 48. *Dillett v. Kemble*, 66

See PRACTICE, 13.

MORTGAGE.

1. The lien of a mortgage given by a railroad company upon after acquired property, held to attach to such property the instant it was acquired, and that by operation of the covenants therein, the mortgage trustees held such property subject to the trusts of the mortgage. *Williamson and Upton v. N. J. Southern R. R. Co.*, 13

2. Bill to foreclose a mortgage given as security for money that might be advanced, dismissed, no money having been advanced under the arrangement from which it originated. *McDowell's Executors v. Fisher*, 93

3. Acceptance of interest upon a mortgage, without claim of forfeiture, after the expiration of the time when, by its terms, the principal became due, accompanied by an acknowledgment of the receipt, as of the very day on which it fell due, and the receipt of interest on the mortgage subsequently, without any claim of forfeiture—held, a waiver of the forfeiture. *Sire v. Wightman*, 102

4. The holder of that mortgage was third mortgagee, and a bill had been filed by the second mortgagee to foreclose his mortgage, and a final decree had been entered in favor of the first, second, and third mortgagees. The owner of the equity of redemption had permitted the suit to proceed to decree and execution, expecting to be able to pay off the first and second mortgages before sale. He has paid them off, and now asks that the execution be stayed except as to the costs of the holder of the third mortgage, which is not yet due. Execution stayed, on the payment of costs and interest. *Ib.*

5. The complainants, trustees and *cestuis que trust*, held a second mortgage on premises on which a defendant held the prior mortgage. The defendant was interested as a *cestui que trust* under the second mortgage. He also had a claim against the mortgagors, which was

- not secured by mortgage. The complainants were permitted to redeem his mortgage, and he was compelled to accept the amount of the principal, interest, and costs of the decree and execution in foreclosure on his mortgage, which was deposited in court on his refusal to accept it when tendered to him, with interest on it at the rate (four per cent. per annum) allowed by the rule of the court, since the default was made, and to assign the decree and execution to secure to those of the *cestuis que trust* under the second mortgage, who had contributed for the redemption, the repayment of their contribution, with interest. For the protection of the defendant's interest under the second mortgage, it was decreed that no sale of the mortgaged premises under the decree should be made, except by order of this court. *Cassidy v. Bigelow*, 112
6. If, by agreement, a deed is to be delivered at a future day, and the vendor takes a purchase money mortgage on the land, but does not record it before the day on which the deed is to be delivered, and the deed is not delivered before that day, and, in the meanwhile, the purchaser erects buildings on the land, the estate of the vendor is not subject to a lien for materials used in the construction of such buildings, and the purchase money mortgage is entitled to priority over the lien claim. *Huber v. Diebold*, 170
7. The equity which entitles a subsequent mortgage encumbrancer to the benefit of a release executed by a first mortgagee, arises only when the first mortgagee gives the release with knowledge of the existence of the subsequent mortgage; and if the release is executed without notice of existing equities on the part of the subsequent encumbrancer, the first mortgagee is not responsible for the consequences of his act, nor is the lien of his mortgage in any wise impaired. The recording of the subsequent mortgage will not operate as constructive notice of its existence to the prior mortgagee. *Ward's Executors v. Hague*, 397
8. To entitle the holder of a judgment on a lien claim upon a building erected upon premises covered by a mortgage, to the benefit of a release, made after the commencement of the building, of other land embraced in the mortgage, the mortgagee must have had knowledge at the time he executed the release, of the existence of the claim, and have acted in bad faith and with unjust intention. The mere fact that when the release was made the building was in progress, and the mortgagee knew it, is not sufficient. *Ib.*
9. A mortgage signed in blank, and given to an agent, by whom it is afterwards filled in and delivered, is not a legally executed deed. The most that can be claimed for it is, that it may create an equitable lien, which this court may, under proper circumstances, enforce. *Fox v. Palmer*, 416
10. If admitted to be an equitable lien, it cannot prevail over equitable rights of another who has also the legal title. *Ib.*
11. In a suit to foreclose a lost mortgage, the mortgagor cannot resist payment of either principal or costs on the ground of a refusal to indemnify him. *Sharps' Administrators v. Cutler*, 425
12. A deed absolute on its face, held to be a mortgage, it having been intended by the parties to be a mere security. *Melick v. Creamer*, 429
13. The general rule disallows costs to the complainant in a suit against a mortgagee to redeem. In this case, the special circumstances held to be such that neither party should have costs against the other. *Ib.*
14. Where a mortgage is shown to be an open one, the holder of it can recover nothing but what is proved

with reasonable certainty to be due. Doubts and indefiniteness should work against the mortgagee and not in his favor. The burden of proof is on him. *Kline v. McGuckin*, 433

15. A mortgage given by a husband and wife, in trust for the wife, to secure to her money alleged to have been loaned by her to her husband out of her separate estate, held to be a lien on the mortgaged premises, in the hands of an assignee for value, subsequent to a junior mortgage by the same parties. *McFarland v. Gilchrist*, 487

16. The assignee, in such case, has no higher equity against the junior mortgagee, than the trustee and her *cestui que trust*. *Ib.*

17. In a suit to foreclose a purchase money mortgage, the mortgagor and grantee in the conveyance, is entitled, by virtue of the covenants against encumbrances therein contained, to have the amount of tax liens outstanding on the mortgaged premises deducted from the amount due on the mortgage, and a decree taken only for the balance. And the assignee of such mortgage holds it subject to the same equity. *National Bank v. Pinner*, 495

18. A mortgagee in possession will not be allowed compensation for his trouble in taking care of the estate. *Elmer v Loper*, 475

19. Directions for taking an account between mortgagor and mortgagee in possession. *Ib.*

See DECREE, 3, 7.

EVIDENCE, 4.

MECHANICS' LIEN, *passim*.

MERGER.

PRACTICE, 5.

SHERIFF'S SALE, 5.

USURY, 3-6.

MORTGAGEE AND MORTGAGOR.

See MORTGAGE, *passim*.

TRUST AND TRUSTEE, 10, 11.

MUNICIPAL CORPORATION.

1. When land owners stand by and permit street improvements to be made by a contractor in violation of his contract, and permit the authorities to pay for such improvements, equity will not enjoin the authorities from enforcing payment of assessments made therefor, under authority of the charter. *Dusenbury v. Mayor of Newark*, 295

2. As a general rule, equity will not interfere to restrain the collection of an assessment which is illegal or void, merely because of its illegality; there must be some special circumstances attending the injury threatened to bring the case within some recognized head of equity jurisprudence: otherwise, the person aggrieved will be left to his remedy at law. *Ib.*

3. The objection that the party has never had an adequate remedy at law, cannot avail him in this case; the reasons considered. *Ib.*

4. Under an injunction bill against city authorities to restrain a sale of complainant's land to pay an alleged fraudulent and void assessment for street improvements, an order for proof was entered by default. Order set aside on the ground of surprise. *Lewis v. City of Elizabeth*, 298

5. A municipal corporation has a much stronger claim for relief against the consequence of delay and negligence of the officer upon whom the charge of its litigation is devolved, than an individual acting for himself in his own interest, would have against the consequences of the neglect of his solicitor or counsel. *Ib.*

6. A party aggrieved by an illegal assessment, has his remedy at law, and when that is adequate and ample, equity will not interfere. *Ib.*

7. In this case no fraud is shown, except by vague and inconsequential statement, and if there was, the complainant is bound by his laches.

The improvements for which the assessment was made, were all paid for long before the bill was filed. *Ib.*

Under a provision of a city charter, that "where streets are ordered to be opened, graded, or paved, or where side or crosswalks are ordered to be made, the owners of property on the line thereof may open, grade, and pave, or lay side or crosswalks at their own expense, but in the manner directed by the board of councilmen, provided they do the same within a reasonable time, to be fixed by said board, otherwise said improvement shall be done by the city, in the manner provided by this act." *Held—*

8. That permission given to property owners to grade a street, for opening, regulating, and grading which an ordinance was passed upon their application, did not take away from the council their power over the matter of regulating and grading the street. *Morris v. Mayor and Council of Bayonne*, 345

9. That the property owners having graded only a part of the street, leaving the rest of it ungraded, and having ceased to do any work on it, the council would not be restrained from completing the work. *Ib.*

10. A party has no standing to invoke the aid of the court against the execution of a public improvement by the municipal authorities, because he will thereby be made liable to be assessed for such improvement, if, as he insists, the authorities have no power to make the improvement. *Ib.*

11. It appearing from the bill and appended affidavit, and not being contradicted, that the complainant's lands in Elizabeth had been sold by the city for assessments, in connection with other lands not owned by him, and that the complainant's offer to redeem his own lands had been refused by the city, unless payment were also made of the assessment on the lands not his, an injunction was granted re-

straining the city from executing and delivering a declaration of sale of complainant's land. *Duncan v. City of Elizabeth*, 430

NE EXEAT.

Motion to discharge writ refused, for insufficiency of answer and affidavits. *Myer v. Myer*, 28

NEGLIGENCE.

See EXECUTOR, 1.
MUNICIPAL CORPORATION, 5.

NON-JOINDER.

See PRACTICE, 26.

NOTICE.

See MORTGAGE, 7.
PRACTICE, 4, 7, 8.

ORPHANS COURT.

1. The Orphans Court cannot try title to lands, under proceedings for sale thereof for payment of debts. *Swackhamer v. Kline's Adm'r*, 503
2. The Orphans Court has power to revoke letters of guardianship obtained through false representations. *Clement's Appeal*, 508

PARENT AND CHILD.

1. Having voluntarily assumed the support of his step-daughter, the complainant is not entitled to compensation for her support. In the absence of an express promise made by the child after attaining majority to repay the step-father, no compensation can be recovered by him at law or in equity for such support. *Haggerty v. McCanna*, 48
2. A mere promise by a father to reward a daughter for her faithful discharge of her filial duties, in the absence of any contract or legal

obligation on which an implied promise to pay her can be based, is not such an agreement as will support a mortgage subsequently executed to her against the father's creditors. *Gardner's Adm'r v. Schooley*, 150

8. The law will not imply a promise on the part of a parent to pay a daughter for services rendered by her in his household. *Ib.*

PARTIES.

1. Bond holders are not necessary parties to a bill for foreclosure by their trustee, of the mortgage given to secure the bonds. Under the circumstances of this case, the petitioners are not proper parties complainant, but will be admitted as defendants, if they desire. *Williamson & Upton v. N. J. So. R. Co.*, 13
2. *Cestuis que trust* are necessary parties to a bill for foreclosure by their trustee. *Allen's Ex'r v. Roll*, 163

See MECHANICS LIEN, 9.
Pleading, 3, 11.

PARTITION.

1. To entitle a tenant in common to an account of rents and profits from his co-tenant for use and occupation of premises held in common, he must show exclusive possession of the premises, or that some profit has been derived therefrom for which the co-tenant ought to account. *Barrell v. Barrell*, 173
2. Though no question be made as to the legal title of a tenant in common to the share which he claims to own in the real estate of which he seeks partition, yet, where a partition is sought in a court of equity, it will only be accorded on equitable terms, where it seems to the court just that such terms should be imposed. *Ib.*

3. After certain specific devises to his sons, G. and H., the testator directed, that in the division of his estate, the sum of \$8000 be charged to G., and \$11,000 to H., on account of the real estate specifically devised to them, and gave the rest of his estate, real and personal, to his four children, G., H., M., and C., to be equally divided between them. G. and H. were appointed executors, and proved the will. They took the entire personal property, and still hold a large surplus of it, refusing, without reason, to pay to M. and C. their proportions of such surplus, or of the \$19,000 charged by the will upon G. and H. G. filed his bill for partition of the real estate not specifically devised, against the other children. *Held*, that the shares of G. and H., in the residuary real estate, must be charged respectively with the three-fourths of \$8000 and \$11,000, with which they were made chargeable by the will. *Ib.*

PARTNERSHIP.

The acceptance by a creditor of a co-partnership, of a note made by one of the partners in the name of the firm, after the death of the other partner, held, under the circumstances, not to discharge the estate of the deceased partner from the debt, there being no evidence from which the conclusion could be drawn, or the implication arise, that the creditor intended to discharge the estate of the deceased partner. *Titus v. Todd's Adm'r*, 458

See INJUNCTION, 12.

PAYMENT PRO TANTO.

See INJUNCTION, 1.

PERSONALTY.

See EQUITABLE CONVERSION.

PLEA.

See PLEADING, 6.
PRACTICE, 16.

PLEADING.

1. When a party seeks relief in equity from liability for acts done under his authority, on the grounds that the authority was fraudulently obtained, he must show wherein the fraud consists; the mere allegation of fraud is not sufficient. *Smith v. Kuhl*, 38
2. A who has had joint business with B, to whom C has lent his notes and checks to be cashed for B's benefit, cannot, on his bringing suit at law against C on such notes and checks of which he has become the owner in his own separate right, be required to plead with B in order that it may appear whether there is not something due from him to B in their joint business, which may be applied to the payment of the indebtedness of C to A, on the notes and checks. Such is not the object of an interpleader. *Ib.*
3. Executors suing for legacies charged upon lands after the estate has been settled, and having no interest whatever in the legacies, cannot maintain the suit, without joining the legatees as complainants with them. *Cool's Executors v. Higgins*, 117
4. An allegation in the answer as a defence to a bill for a foreclosure of a purchase money mortgage, that "part" of the land intended to be conveyed has been omitted from the description, by metes and bounds, without stating what part, or whether the land is not otherwise sufficiently described to be fully identified, is insufficient. *Allen's Executors v. Roll*, 163
5. The defence of an alleged error in his deed cannot avail the defendant under his answer to a suit for foreclosure of a purchase money mortgage. *Ib.*
6. A stated account is *prima facie* a bar to a suit for account. But the defendant in pleading it, must by his plea, although neither fraud nor error be charged, aver that the stated account is just and true to the best of his knowledge and belief. For want of such averment, plea overruled, with leave to amend. *Driggs v. Garretson*, 178
7. Want of capacity as a defence to the enforcement of a contract, should be distinctly set up in the answer. *Miller's Administrator v. Miller*, 354
8. Defendants obtained an extension of time to answer, on an *ex parte* application, after the expiration of the time limited by law for answering. In their answer they set up usury. It was ordered that so much of the answer as set up usury, be struck out, or that the defendants introduce into the answer, an offer to pay the principal actually received, with lawful interest. *Hill v. Colie*, 469
9. The rule is not entirely inflexible, that the substance of the complainant's case must be contained in the stating part of the bill. *Rorback v. Dorsheimer*, 516
10. A charge of fraud should not be general, but if so charged, the defect must be taken advantage of by demurrer. *Ib.*
11. The sureties of administrators cannot be joined as substantial parties to a bill against the representatives of such administrators, which is grounded on an alleged devastavit committed by such original administrators. *Ib.*
12. The proper course of proceeding in such case, pointed out. *Ib.*
13. An answer which admits that a mortgage was executed to the complainant, a corporation, of "the purport and effect set forth in the bill," does not raise any issue as to

the corporate existence of such complainant, or its capacity to take such mortgage. *Butterfield v. Savings Bank*, 533

See PRACTICE.

TOWNSHIP AUTHORITIES, 1.
USURY, 7, 10, 12.

POLICY OF INSURANCE.

See USURY, 1, 8, 9.

POWER.

1. A judgment recovered against a devisee for life, vested under the will with power to consent that the executors should sell the real estate at their discretion and appropriate the income for the support of such devisee and his family, during the devisee's life, does not work an extinguishment of the power. The lien of the judgment is subject to the power. *Leggett v. Doremus*, 122
2. The power to consent to a sale is not extinguished in all cases where the donee of the power is the life tenant, even by the absolute alienation by him of his life estate. The rule is, that so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. *Ib.*
3. When a power is executed, the person taking under it, takes under him who created the power, and not under him who executes it. The only exceptions are, when the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party; it is a proceeding *in invitum*, and therefore falls within the rule. *Ib.*

See WILL, 17.

PRACTICE.

1. A supplemental bill directed to be filed by trustees, distinctly and fully setting up the claim insisted upon by petitioners, and making all parties in adverse interest, defendants. The litigation under the supplemental bill to be confined to the subject matter thereof. The frame of the bill and the parties to it, to be settled by the court. *Williamson and Upton v. N. J. So. R. R. Co.*, 13
2. When a foreclosure suit has proceeded to decree *pro confesso* and order of reference, and the mortgaged premises are then sold, though the purchaser will be admitted as a party defendant, he will not be permitted to answer. He may be present at the taking of the account and avail himself of all the defences which the mortgagor could, after the decree *pro confesso* against him. *Heritt and Ward v. Montclair Railway Co.*, 100
3. But when the suit has proceeded to final decree, though the purchaser be admitted as a defendant, he cannot contest the complainant's claim. *Ib.*
4. The sheriff's return "served" upon the subpoena, is presumptive proof of the service of the notice required by the 38th rule. *Bell v. Gilmore*, 104
5. A suit to foreclose a purchase money mortgage on lands conveyed to the mortgagor by deed with covenant against encumbrances, which were, at the date of the deed, and at the commencement of the suit, subject to judgments, the amount due on the judgments exceeding that due on the mortgage, so that no deduction could be made from the mortgage debt, stayed until the premises should be released from the lien of the judgments. *Dayton v. Dusenbury*, 110
6. Executors suing for legacies charged upon land, after the estate has been settled, and having no interest whatever in the lega-

- cies, cannot maintain the suit without joining the legatees, as complainants with them. *Cool's Ex'rs v. Higgins*, 117
7. Notice of application for assignment of dower, by publication, where all the persons interested in the lands reside in this state, is a nullity, and assignment of dower to a widow under proceedings had upon such notice, is illegal. *Pier-son v. Hitchner*, 129
8. Minors who have no guardians, are entitled to notice of such application, and guardians *ad litem* should be appointed for them. *Ib.*
9. A defendant can have positive relief against the complainant, even as to the subject matter of the suit, only by cross-bill. *Allen's Ex'r v. Roll*, 163
10. Where, at the reference before a master, an encumbrancer finds that a co-defendant, also holding an encumbrance upon the mortgaged premises, claims an unjust priority over him, and nothing has appeared in the case to lead him to suppose that such priority would be claimed, and he is unable effectually to litigate the matter and resist the claim before the master, the court will, if necessary to his protection, and to effectuate the ends of justice, give him leave to file a cross-bill. *Huber v. Diebold*, 170
11. An objection that the complainant has a complete and adequate remedy at law, comes too late at the hearing. *Cutting v. Dana*, 265
12. Although the court may of its own accord dismiss the bill when it appears on the hearing that the complainant has a complete and adequate remedy at law, notwithstanding the objection was not taken in the pleadings nor noticed in the argument, yet under such circumstances, it is the duty of the court to retain the cause, provided it be competent to grant relief, and have jurisdiction of the subject matter. *Ib.*
13. A mistake in ante-dating a subpoena, when in fact it was not issued before the filing of the bill, may be corrected. *Dinsmore v. Westcott*, 302
14. A defect in the affidavit of mailing a copy of the notice to an absent defendant, in not showing that the place to which it was directed was the defendant's post-office address, may be remedied by supplying the proof by way of amendment. *Ib.*
15. A party claiming an interest in premises against which a foreclosure has been commenced, under a deed not recorded at the filing of the bill, is bound by the proceedings in the suit, so far as the property is concerned, as if he had been made a party to the suit. His not being made a party to the suit, does not affect the title of the purchaser at the sale. *Ib.*
16. The pendency of an action at law by A against B, in a court of another state, constitutes no bar to a suit in equity here by B against A for the same object. *Fulton v. Golden*, 353
17. A husband is not a proper party complainant to a bill by his wife for a reconveyance to her of land which she and her husband conveyed to the defendant, and which was then her separate estate. *Barrett v. Doughty*, 379
18. Leave given to amend by substituting a proper and responsible person as next friend of the wife, and making the husband a party defendant. *Ib.*
19. A misjoinder may be assigned as cause for demurrer, *ore tenus*, at the argument, though a general demurrer for want of equity be overruled. *Ib.*
20. It is the settled practice, that where a demurrer is put into the whole bill for causes assigned on the record, if those causes are overruled, the defendant will be allowed to assign other causes, *ore*

tenus, at the argument, but the demurrer *ore tenus*, must be for some cause which covers the whole extent of the demurrer. *Ib.*

21. Leave given to amend injunction bill, after answer filed, without prejudice to the injunction or other orders made in the suit. *Lanning v. Heath*, 425

22. The answer not to be withdrawn, but left on file, and the suit to proceed upon the newly engrossed amended bill. *Ib.*

23. *Cestui que trust* should be joined with trustee in a suit for the recovery of property belonging to the former. *Elmer v. Loper*, 475

24. Where *cestui que trust* was made a defendant in such a suit, an amendment was ordered at the hearing, striking him out as defendant and making him a complainant. *Ib.*

25. An injunction, issued on bill and answer, restraining the defendants from carrying on their business in specified ways, was, after the lapse of a year, modified without opposition on part of complainants. Under the modified injunction, the business was carried on for another year, when the cause was brought to hearing upon the evidence. The proof being held to be insufficient to justify a decree putting an end to the defendants' business, the cause was ordered to stand without final decree, with permission to either party to apply for leave to produce additional proofs, or to be heard anew. Meanwhile, neither party to pay costs to the other. *Meigs v. Lister*, 489

26. The non-joinder of parties, whose absence simply renders the defendant liable to a revival of the litigation, cannot, as a general rule, be taken advantage of at the final hearing. *Voorhees' Ex'r v. Melick*, 523

See APPEAL.

ASSISTANCE, WRIT OF.

CREDITOR AND DEBTOR, 1, 2.

DIVORCE, 8.

PURCHASER.

PRESUMPTION.

See DEED, 1.

HUSBAND AND WIFE, 5.

PRINCIPAL AND AGENT.

1. A principal who has executed a contract for the sale of land, and authorized an agent to receive an installment of purchase money under the contract, and given the purchaser to understand that the balance was to be paid to such agent, cannot repudiate the agency and refuse to execute the deed because the agent, to whom the purchaser has paid the whole of the purchase money, is unable to pay it over to the principal. *Hand v. Jacobus*, 154

2. Payments made to an agent, on account of principal and interest of a bond, allowed the debtor, the action of the creditor, having been such as to estop him from denying the agency. *Haines v. Pohlman*, 179

PRIZE MONEY.

The right to prize money vests in the captor from the time of capture, and not from the condemnation. *Matter of Swartwout's will*, 369

PURCHASER.

1. Application for order for possession by purchaser of mortgaged premises at sheriff's sale; order accordingly. *Frazier's Administrators v. Beatty*, 343

2. Purchasers at sales under decrees of this court, if not already parties to the suit, are regarded, to a certain extent, as parties to it, to be under the control of the court on the one hand, and under its protection on the other. Such purchaser may therefore be compelled to complete his purchase in a summary way by an order upon him, without a bill, to pay the money or

bring it into court. *Silver v. Campbell*, 465

See EASEMENT.

MECHANICS' LIEN, 5, 6, 8.

PRACTICE, 2, 3.

REDEMPTION.

SHERIFF'S SALE 5

SPECIFIC PERFORMANCE, 2.

USURY, 3.

WILL, 1, 2.

RAILROAD COMPANY.

1. Question of receivership, in this case, not passed upon, the trustees having filed their petition that the receiver appointed under another application might be directed to deliver to them as trustees under the mortgage, the possession of the New Jersey Southern Railroad, including the L. B. and S. S. road and its appurtenances. *Williamson and Upton v. The New Jersey Southern R. R. Co.*, 13
2. Where a surety, who was subrogated to the rights of a land owner to whom the former has been compelled to pay the debt of his principal for land taken by the principal, (a railroad company,) under the exercise of the right of eminent domain, applied to this court to enjoin the use of the company's road over the land—*Held*, that it was not necessary to his protection to prevent such use, there being nothing to be gained by him through such injunction; the company being insolvent, and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public, merely by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure. *In the matter of Abram S. Hewitt*, 210
3. Where land has been taken under the exercise of the right of eminent domain, and a question is pending in a court of law as to the amount of compensation to which the land owner is entitled, he will be protected in his constitutional right to possession of his property, until his compensation be ascertained and paid or tendered to him; and the company in whose favor the condemnation is made, will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing. *Mettler v. Easton and Amboy Railroad Co.*, 214
4. To secure the land owner in his constitutional right, and at the same time to spare the company unnecessary delay, the court will, on the latter paying the land owner so much of the compensation as is undisputed, and the costs of the suit in this court, and paying into court an amount sufficient to cover the disputed claim, to the end that the land owner may have the same if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land. *Ib.*
5. A receiver under the supplement of March 17th, 1870, to the act to prevent frauds by incorporated companies, directed to sell the property, part free from encumbrances, and part subject thereto, and the order and manner of sale specifically directed. *Middleton v. New Jersey West Line Railroad Co.*, 306
6. Question of constitutionality of that act not passed upon. *Ib.*
7. Where a railroad company had entered into a written agreement for their right of way, with the person who was the ostensible owner, and also the owner of record, of the property over which the right of way was sought, and by virtue of a license in such agreement, entered into possession and graded their road-bed, and proceeded to lay their track, an injunction to restrain them from the use of the property at the suit of the wife of such ostensible owner, who claimed that at the time of making such agreement, she was the real owner of the property by deed unrecorded, and that the agreement and license were made

without authority, was refused; it appearing that she was cognizant of the entry of the company and of their work upon the property, and gave them no notice of her ownership, nor repudiated the agreement or license, and the company were guilty of no negligence. *Pickert v. Ridgefield Park Railroad Co.*, 316

8. The Hudson Tunnel Railroad Company, claiming to be a corporation organized under the General Railroad Law, having entered upon land of complainants without their consent, and having made large excavations therein, were restrained from further prosecuting their work until they should make compensation. *M. & E. R. R. Co. v. Hudson Tunnel Co.*, 384

9. Such entry having been made, not only without the permission, but against the warning and protest of the complainants, the defendants have no equity to be permitted to proceed with their work, even in view of their effort to make compensation, on the ground of acting in good faith in beginning their work, and under misapprehension of the authority of the municipal authorities (by whose permission they entered) over part of the premises. There is neither mistake, accident, or exigency. *Ib.*

10. That part of the land taken was part of a public street, does not affect the right of the owners to compensation. *Ib.*

11. The necessity of first making compensation is not avoided by the plea that the work in which the defendants are engaged is an exploration. It is not the exploration contemplated by a charter, giving license to enter upon lands to explore, &c. *Ib.*

12. Equity will enjoin a trespass which is continuous, and invades proprietary rights. *Ib.*

13. Under a clause contained in their charter, that if a railroad company shall find it necessary to change the location of any portion of any

turnpike or other public road, they are authorized and empowered so to do and to occupy such portions of the turnpike or road as they may deem necessary or expedient, &c., the company are not the sole judges of the necessity or expediency of changing the location, &c. They have not the power to change the location whenever they shall decide that it is necessary or expedient, but only when the necessity, in point of fact, exists. *E. A. R. R. Co. v. The Inhabitants, &c.*, 565

See MORTGAGE, 1.

RECEIVER.

See RAILROAD COMPANY, 1, 5.

RELEASE.

See MORTGAGE, 7, 8.

REDEMPTION.

1. A purchaser, (first mortgagee,) at a sale under a foreclosure suit upon his mortgage, to which suit a second mortgagee was, by oversight, not made a party, is entitled to require the second mortgagee to redeem in a reasonable time, or to be foreclosed. *Parker v. Child*, 41

2. Such purchaser, as prior incumbrancer, must be redeemed, not only to the full amount due for principal and interest upon his mortgage, but also to the full amount of the purchase money paid by him over and above such amount, the excess having been appropriated in payment of claims prior to the second mortgage, and the purchaser being thereby subrogated to the rights of the holders of those claims. *Ib.*

3. The purchaser, if redeemed, must account for the rents and profits during his occupation of the premises, and cancel a mortgage given by himself thereon, after he had received his deed. *Ib.*

See MORTGAGE, 5.

RENTS AND PROFITS.

See DOWER, 3.
PARTITION, 1.
REDEMPTION, 3.

RESIDUARY REAL ESTATE,
SHARES CHARGED UPON.

See PARTITION, 3.

RESIDUE.

See WILL, 13, 14.

RESULTING TRUST.

See HUSBAND AND WIFE, 6.

REVIEW.

Estimates as to the value of property must be demonstrably erroneous to induce the court to interfere with them on appeal. *Voorhees' Executrix v. Melick*, 523

SALE OF LAND.

1. An adjournment of a sale of real estate under a public statute, for any period not exceeding one week, need not be advertised in the newspapers. A formal adjournment of of the sale from week to week is sufficient. *Hewitt v. Montclair Railway Co.*, 392
2. Application to set aside master's sale refused, no improper control of complainant's solicitor over the adjournments, nor any surprise upon the petitioner, appearing; nor that any greater price could be obtained upon a re-sale, or that a re-sale could in any way benefit the petitioner. *Ib.*

See SHERIFF'S SALE.
TENANT BY CURTESY.
WILL, 17.

SEPARATE ESTATE.

See JUDGMENT, 2.
MARRIED WOMAN.

SETTLEMENT.

See HUSBAND AND WIFE, 5.

SHERIFF'S SALE.

1. A refusal to adjourn a sale, in the exercise by the sheriff of a reasonable discretion, is not sufficient ground for setting the sale aside. *Morris v. Woodward*, 32
2. A requirement that twenty per cent. of the purchase money shall be paid at the close of the sale, and satisfactory security be given for the balance, will not suffice to set aside the sale, where no complaint was made of the terms, nor any relaxation of them requested, and where it does not appear that any one was prevented from bidding by reason of them. *Ib.*
3. Where an agreement is made by the complainant with a mortgagee defendant, present at the sale and intending to buy in the property to protect his claim if necessary, that if such mortgagee would not bid, and would permit him to buy the property, he would pay his claim, and by reason of the latter not bidding in pursuance of such agreement, the property brought much less than it otherwise would have done, thereby throwing upon the mortgagor, against whom the complainant had taken a personal decree for deficiency, a liability for a greater deficiency, such agreement is a fraud upon the mortgagor, which vitiates the sale. *Ib.*
4. Application to set aside a sheriff's sale on the ground of unfairness, arising from an alleged misunderstanding as to the manner of sale and the amount and apportionment of encumbrances, refused. *Bullock's Executors v. Woodward*, 279
5. The complainant took a decree for sale of the mortgaged premises to raise the interest due on the mortgage, and costs of suit. The principal was not due. The decree provided for the sale of the premises to raise the interest and costs,

and that the mortgage stand as a lien for the payment of the principal, with the interest to become due thereon, according to the condition of the bond. The complainant purchased the property at the sale under the execution, and subsequently applied to be relieved from his bid, on the ground of surprise; that he was not aware that in purchasing the property, he would extinguish his mortgage. Application refused. *Mott v. Shreve*, 438

SOLICITOR.

See MUNICIPAL CORPORATION, 5.
TOWNSHIP AUTHORITIES, 3.

SPECIFIC PERFORMANCE.

1. Where a wife refuses to join in a conveyance of lands which her husband has sold, and there is no proof of fraud on the part of the husband in her refusal, the court will not compel the husband to procure a conveyance or release by her, or require him to furnish an indemnity against her dower. *Reilly v. Smith*, 158
2. Specific performance in such case refused, and the purchaser left to his remedy at law, it not appearing that he was willing to pay the full balance of the purchase money and accept a deed from the vendor alone. *Ib.*
3. Though, in general, the Court of Chancery will not entertain a bill for specific performance of contracts for chattels relating to merchandise, but will leave the party to his remedy at law, yet, notwithstanding this general distinction between personal contracts for lands, in some cases, equity will enforce contracts for personal property. *Cutting v. Dana*, 265
4. Where the complainant has not a clear, complete, and adequate remedy at law, or where some other ingredient of equity jurisdiction is mixed up in the transaction, equity will interfere to decree specific per-

formance of a contract for a sale of a debt. *Ib.*

5. Where a party agrees to assign a claim, upon the delivery to him of certain notes by a certain day, and the notes are then tendered, the offer is thereby accepted and the contract complete. That acceptance is a sufficient legal consideration for the engagement. There is no want of mutuality in such a contract. *Ib.*
6. An administrator is entitled to enforce specific performance of a contract made with his intestate for the purchase of real estate. *Miller's Administrator v. Miller*, 354
7. Want of capacity, as a defence to the enforcement of a contract, should be distinctly set up in the answer. *Ib.*
8. To a bill by an administrator to compel specific performance of a contract made with his intestate, for the purchase of real estate, it was objected that the administrator was not properly before the court to entitle him to a decree; that the intestate's widow would not release her dower; that the contract provided for opening roads through the property; and the administrator was in laches in filing the bill. *Held*—1. The judgments against the heirs were not liens upon the property. 2. The widow did not appear to have been requested to release her dower, but appeared to have been willing to do so, provided the purchase money were paid to the administrator; and the administrator, by the bill, tendered a release of the dower, on the purchaser's performance of agreement. 3. The heir-at-law could have opened the roads provided for in the contract. 4. The lapse of two and a-half months after taking out letters of administration, which was on the day when the deed was to be delivered, before filing the bill, does not deprive complainant of the right to bring this suit.
9. When a contract which should be enforced contains inequitable pro-

visions, equity will decree performance of it, only upon such terms and with such restrictions, as to secure equity in the premises.

Ib.

10. Time, in this case, is not of the essence of the contract.

Ib.

11. Specific directions by the court, as to the carrying out of the agreement; the terms of the mortgage to be given for the purchase money; and the disposition of the purchase money and securities.

Ib.

See CONTRACT.

MARRIED WOMAN.

STATUTE OF FRAUDS.

See BONA FIDE PURCHASER.

STAY.

See MORTGAGE, 4.
PRACTICE, 5.

STOCK.

1. The market value of stock is the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry, a reasonable range in point of time is allowable.

Douglas v. Merceles, 144

2. Under a reference to ascertain the market price of a certain stock on a given day, the intrinsic value of the stock should not enter into the estimate, unless there has been no market price within a reasonable period, either before or after that day.

Ib.

3. It is not material, in ascertaining such value, to inquire why the stock appeared in the market, when it was not thrown on the market in large quantities, and there is no reason to doubt that the seller ob-

tained the best price he could for it.

Ib.

SUBPENA.

See PRACTICE, 4.

SUBROGATION.

The right of substitution or subrogation is a purely equitable one, and the extent to which it will be exercised must often depend upon circumstances. Whether it will be extended to the extremest point, so as to include all the rights of the creditor, must often depend on whether it is necessary to the protection of the surety that it should be so. *Matter of Abram S. Hewitt,* 210

See REDEMPTION, 2.

SUPPLEMENTAL BILL.

See PRACTICE, 1.

SUPPORT.

See PARENT AND CHILD, 1.

SURETY.

See PLEADING, 11.

RAILROAD COMPANY, 12.
SUBROGATION.

SURPRISE.

See DECREE, 2, 8.

MUNICIPAL CORPORATION, 4.
SHERIFF'S SALE, 5.

TAX.

See DEED, 4.

MORTGAGE, 17.

TAX WARRANT.

1. The warrant for sale of land for

taxes, under the act "to make" taxes a lien on real estate, and to authorize sales for the payment of the same," (*Nix. Dig.* 947,) must be issued to a constable of the township. There is no authority for issuing it to the collector of taxes. *Dinamore v. Westcott*, 470

2. A deed made by a collector, under a sale in pursuance of a warrant under that act, held void. *Ib.*

TENANT BY CURTESY.

1. Where lands, subject to curtesy, are sold by commissioners in such manner as to pass title free of the curtesy, the interest of the proceeds will belong to the tenant by curtesy, during life. *Jacques v. Ennis*, 402
2. The lands in this case held not to have been sold free of curtesy but subject to it, because the order of the Orphans Court directing the sale was made without the tenant by the curtesy having been made a party to the proceedings, and without any adjudication whatever, respecting his estate. *Ib.*

TENANT IN COMMON.

See PARTITION, 1.

TIME.

See SPECIFIC PERFORMANCE, 10.

TOWNSHIP AUTHORITIES.

1. Township authorities upon which devolves, by law, the duty of keeping the public highways in good order and repair, and which are liable to indictment for failure or neglect to perform such duty, have such special interest beyond the public at large in the highways, as entitles them to file a bill in their own name, to restrain the shutting up or rendering impassable such highways. *E. and A. R. Co. v. The Inhabitants, &c.*, 505

2. It is not necessary to the maintenance of such suit, that special authority be given to the authorities by meeting of the inhabitants of the township in town meeting assembled. The power and duty of defending the township reside in some of its officials, without the necessity of convening a town meeting to authorize the institution of every particular suit. *Ib.*

3. It will be presumed in such proceedings as the present, that the solicitor and counsel who filed the bill, had full authority to commence the suit. *Ib.*

TRESPASS.

See RAILROAD COMPANY, 12.

TRUST AND TRUSTEE.

1. A charge of all testator's debts and funeral and testamentary expenses upon all his estate, real and personal, not otherwise specifically bequeathed, is a equivalent to a trust for sale of all the real and personal estate not otherwise specifically bequeathed, for the purpose of paying those debts and expenses; and executor's deed therefor will pass to the purchaser, both the legal and the equitable estate. *Dewey's Executors v. Ruggles*, 35
2. The general rule is, that a purchaser is not bound to see to the application of the purchase money when the testator's debts are charged generally upon his estate. There are exceptions to it, where there is a breach of trust by the executors, and the purchaser is a party to it, and where the purchase is after the institution of a suit which takes the administration of the estate out of the hands of the trustee. There is no such allegation here. *Ib.*
3. It is not necessary to a trust that there should be any transfer of property, whether the fund be in the possession of the donor or of another. The property may still remain as it was, and the donor

- may constitute himself as the possessor, trustee of it. *Eaton v. Cook*, 55
4. If a person, by a written instrument, or by word, directs his debtor to hold the money due, in trust for a third person, and such direction is communicated to the debtor, an effectual trust in favor of the donee is created, especially where, as in this case, the debtor has acted on the direction and consented to the arrangement. *Ib.*
 5. In construing a declaration of trust: "I hereby cancel the above bond and give it voluntarily to Mrs. J. C. and her heirs," verbal declarations of the donor, made prior to and contemporaneously with the gift, and relating to it, are competent evidence as to whom she meant to designate by the words "her heirs." *Ib.*
 6. Bill of interpleader as to moneys deposited in bank by trustee in name of *cestui que trust*, and demanded by both. Expenses of trust directed to be paid to trustee, and balance to *cestui que trust*. *Rahway Savings Institution v. Drake*, 220
 7. In this case, the court refused to appoint a married woman trustee of funds of which she was entitled to the interest for life, upon considerations of marital influence, domicile, and near relationship to the remaindermen. *Parker's Executors v. Moore*, 228
 8. When trustees are discharged from their trust under the will, several trustees will be appointed to take charge of different portions of the estate, if for any reason it is necessary or desirable. *Ib.*
 9. Where there is a bequest of the income of a sum of money to one for life, and then the principal to another, without any trustee being named in the will other than the executor, he will be held to be trustee. *Ib.*
 10. A trustee who brings into court an account of his dealings with the trust estate, manifestly unworthy of credit, is not entitled to compensation for his management of the trust property. *Elmer v. Loper*, 475
 11. Where a mortgagee or trustee has so intermingled the trust property with his own, that it is impracticable to ascertain how much of certain charges, such as taxes levied upon the whole property, ought to be borne by the trust estate, he is entitled to no allowance in respect to such charges. *Ib.*
 12. When property is sold by a trustee in violation of the terms of the trust, equity will hold such trustee responsible for the highest value of the property. *Voorhees' Executrix v. Melick*, 523
- See EXECUTOR, 2.
MORTGAGE, 5, 15, 16.
VENDOR AND PURCHASER.
WILL, 1, 2, 9, 10, 12.
- ### USURY.
1. A requirement by the lender, (an insurance company,) that the borrower take out a policy of insurance as a condition of making the loan, is not, of itself, evidence of a usurious agreement. *Washington Life Ins. Co. v. Silk Co.*, 160
 2. Though strict proof of the defence of usury is required, the weight of evidence will not be disregarded under that defence. *Warwick v. Marlatt*, 188
 3. The purchaser of mortgaged premises at a sheriff's sale, may avail himself of the defence of usury against a prior mortgage, though he purchased subject to that mortgage. *Ib.*
 4. An agreement between the holder of a usurious mortgage and the mortgagor, that, in consideration of a deduction allowed the latter by the former, in the settlement of certain debts due him from the mortgagor, the mortgage should be regarded as purged of usury, will

- not remove the taint so long as the mortgage remains in the same hands. *Ib.*
5. Such holder is not entitled to recover the amount actually loaned. The supplement of April 12th, 1864, applies only to contracts thereafter made. *Ib.*
6. In a suit to foreclose a usurious mortgage, the mortgagor is not entitled to a deduction of all the interest paid on the whole principal sum of the mortgage, but only of the interest on the excess of such principal sum over the amount actually loaned. *Bedle v. Wardell*, 349
7. The facts as proved, held not sufficient to support the defence of usury, but, if sufficient, held not to be stated with sufficient certainty in the answer. *Homeopathic Ins. Co. v. Crane*, 418
8. Where a policy of life insurance is issued in good faith, at fair and customary rates, as part of an operation wherein a loan to the policy holder is the other part, the legality of the loan cannot be questioned, though it was dependent on the taking out of the policy. The transaction must be judged by the criterion of good or bad faith. *Ib.*
9. The bargain will not be held to be usurious because suspicious circumstances attach to it, nor because such bargains are susceptible of being made a mere cloak to cover usury. That the policy was taken out as a cloak or device to evade the statute, must be established by cogent proof, direct or inferential. *Ib.*
10. The facts and circumstances of the usurious bargain must be particularly set forth in the answer. *Ib.*
11. Usury will not be inferred when the opposite conclusion can be reasonably and fairly arrived at. *Gillette v. Ballard*, 491
12. To sustain such a defence it must be shown that there was a usurious agreement. *Ib.*
13. The chattel mortgage in this case held not to be usurious in view of the nature of the whole transaction. *Ib.*
- See EVIDENCE, 4, 6.
PLEADING, 8.
- ### VENDOR AND PURCHASER.
- In equity, on the execution of a contract for the sale of real estate, the vendor becomes trustee of the property for the purchaser, and upon his death, intestate, his heir-at-law becomes such trustee in his stead. Judgments against the heir-at-law are not liens upon the property. *Miller's Adm'rs v. Miller*. 354
- See CONTRACT, 1, 2, 6-8.
MECHANICS LIEN, 5, 6.
MORTGAGE, 6.
- ### VOLUNTARY CONVEYANCE.
- See CREDITOR AND DEBTOR, 3, 6, 7.
HUSBAND AND WIFE, 2, 3.
- ### WAIVER.
- See MORTGAGE, 3.
- ### WASTE.
1. A mortgagor will not be permitted to commit waste upon the mortgaged premises to the extent of rendering them an insufficient security for the mortgage debt. *Coggill v. Millburn Land Company*, 87
2. No authority to commit waste upon mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid. *Ib.*
3. It is the practice of this court to stay waste between tenants in common, in special cases, among which is the pendency of a suit for partition. *Coffin v. Loper*, 443

WAY.

See GRANT, 3.

WIDOW.

See DOWER, 2, 3.

WILL.

1. A charge of all testator's debts and funeral and testamentary expenses upon all his estate, real and personal, not otherwise specifically bequeathed, is equivalent to a trust for sale of all the real and personal estate not otherwise specifically bequeathed, for the purpose of paying those debts and expenses; and the executor's deed therefor will pass to the purchaser both the legal and the equitable estate. *Dewey's Ex'rs v. Ruggles*, 35
2. The general rule is, that a purchaser is not bound to see to the application of the purchase money when the testator's debts are charged generally upon his estate. There are exceptions to it, where there is a breach of trust by the executors, and the purchaser is a party to it, and where the purchase is after the institution of a suit which takes the administration of the estate out of the hands of the trustee. There is no such allegation here. *Ib.*
3. A bequest of a sum of money generally, without distinguishing it from testator's other moneys, or mentioning out of what fund it is to be paid, is a general legacy. A designation of such bequest in the residuary clause as a "specific" legacy, will not change its character as general, where the term is evidently used by the testator with reference to the fact that it was a legacy of a specified sum of money. *Parker's Ex'rs v. Moore*, 228
4. Though, as a general rule, the gift of the interest of a fund, standing by itself, is a gift of the corpus, yet, if from the context of the will it appears that the interest only was intended for the legatee, the gift of the interest will not pass the principal. *Ib.*
5. A gift of \$50,000 to A, "the interest thereof to be paid to her during life," and the principal to her children at her decease, does not pass the corpus of the fund to A. *Ib.*
6. As between the tenant for life and the remainderman, the rule, at least as to funds that are not permanent, is, that what is not specifically given is to be converted into money, if the property and the parties are not abroad. In this case, the testator has directed the conversion. *Ib.*
7. A bequest of \$10,000 to a daughter, to be held by testator's executors in trust for her, the interest to be paid to her annually, and if she should marry, and have a child or children, then after her death the \$10,000 to go to such child or children, passes the funds to her executors, subject to her disposition of it by will, upon her death without issue. *Gulick's Ex'rs v. Gulick*, 324
8. The gift of the produce of a fund, without limit as to time, passes the fund itself. *Ib.*
9. Where there is a gift to children or other legatees, the shares being given absolutely in the first instance, followed by a direction to settle the shares upon trusts which do not exhaust the whole interest, the legatees take their shares absolutely, subject to the qualifying trusts. *Ib.*
10. And where the testator provides that the portion of his daughters shall be held in trust by his executors or other persons appointed for the purpose, during the life of the daughters, and go to their children or issue, if any such they have, at their decease, this is regarded as a qualification or limitation of the estate of such daughters only as leave children or issue, and will not affect the vested or transmissible character of the shares of such



- daughters as die without leaving children or issue. *Ib.*
11. The fact of a settlement by testator in such case to the use of a daughter, free from the control of any husband she might have, is no evidence that the testator intended that she should have a life estate only. *Ib.*
12. Where, after an estate has been settled, a trust fund remains in the hands of the executors, separated from the general residue, which they have held for a legatee during life, and on the decease of the legatee several claimants for the fund appear, the costs of a suit instituted by the executors, to determine the ownership of the fund, must be borne by the fund itself. *Ib.*
13. Where testator gives the net income of a share of the residue of his estate to a son, absolutely, but not the principal, disposing of the latter, in case the son die without having received it, leaving issue, and making the payment of the principal to the son entirely discretionary with the executor, such share does not vest in the son nor as to be transmissible in case of the decease of the son without having received it. *Garthwaite's Executor v. Lewis*, 351
14. Such share, in case of the son's death without issue, does not fall into the residue, but is undisposed of. Though the rule is that a general residuary bequest carries lapsed and void legacies, it is one of the exceptions that it does not include any part of the residue itself, which fails. *Ib.*
15. The right to prize money vests in the captor from the time of the capture, and not from the condemnation. Hence, prize money for prizes not condemned for six years after the captor's death, was adjudged to pass to his legatee, under a residuary clause: "all the residue of funds now held by me, and all property to which I may become entitled." *In the matter of Stewart's Will*, 389
16. The words in the will used to dispose of certain personal property, held to constitute a specific bequest. *Louderbough v. Weart*, 399
17. When express directions are given in a will to sell land, and no person is named to make the sale, the power of sale is held by implication to be in the executors, in cases where it is their duty to distribute or pay out the proceeds. *Ib.*
18. The tearing out of the seal affixed to a will, and of part of the testator's signature, and the obliteration of the rest of his name and of the names of the witnesses, are a cancellation of the will. *In the matter of White's Will*, 501
19. From the finding of a will in testator's box thus cancelled, the presumption arises that the cancellation was his act, done *animo cancellandi*, and that by that act he intended to render the will null and void. *Ib.*
20. A general allusion in a letter found in the same box, to testator's will, and a conversation with the executor therein named, shortly before testator's death, in reference to a request made by the will and which was then known by the executor, are too loose and uncertain to establish a will contrary to the cancellation by the testator himself. *Ib.*
21. In order to ascertain testator's intention as expressed in his will, the whole will, so far as it in anywise relates to the subject matter in question, must be read together. *Graydon v. Graydon*, 561
22. The question is not what the testator supposed he had done or intended to do, aside from the language of the will. It is the duty of the court to construe the will in the light of the terms used and give to them their legal and natural import. *Ib.*
23. The heir-at-law will not be disinherited, nor forfeiture of an estate decreed, except upon words free from doubt. *Ib.*





